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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945 46

No. 892 48

WALTER J. ROTHENSIES, INDIVIDUALLY AND AS UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA, PETITIONER

v.

THE ELECTRIC STORAGE BATTERY COMPANY, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 26, 1946
CERTIORARI GRANTED MARCH 25, 1946

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INDEX

	Original	Print
Record from D. C. U. S., Eastern District of Pennsylvania	1	1
Docket entries	1	1
Complaint	3	2
Exhibit A—Statement showing date of payment of taxes, month in which sales were made and amounts of taxes	14	8
Exhibit B—Claim for refund	16	9
Exhibit C—Letter rejecting claim for refund	28	17
Exhibit D—Claim for refund [omitted in printing]	29	
Answer	43	17
Stipulation as to amendment to answer	48	20
Amendment to answer	49	20
Agreed Statement of Facts	51	21
Plaintiff's Requests for findings of fact and conclusions of law	87	30
Defendant's Requests for findings of fact and conclusions of law	96	34
Opinion, Kirkpatrick, J., sur pleadings and proof	101	37

Record from D. C. U. S.—Continued	Original	Print
Findings and conclusions	114	45
Judgment	116	45
Certificate of Probable Cause	117	46
Notice of Appeal	118	46
Order of Court extending time for filing record on Appeal [omitted in printing]	119	
Stipulation of counsel waiving filing of second copy of Record on appeal [omitted in printing]	120	
Designation of contents of record on appeal [omitted in printing]	121	
Amended Designation of contents of record on appeal [omitted in printing]	122	
Certificate of clerk [omitted in printing]	123	
Proceedings in U. S. C. C. A., Third Circuit	124	47
Order assigning judge	124	47
Minute entry of argument and submission	125	47
Opinion, Goodrich, J.	126	48
Judgment	137	55
Clerk's certificate [omitted in printing]	138	56
Order allowing certiorari	139	56
Stipulation as to printed record	140	56

1 In United States District Court for the Eastern District of Pennsylvania

Civil Action No. 3299

THE ELECTRIC STORAGE BATTERY COMPANY

v.

WALTER J. ROTHENSIES, INDIVIDUALLY AND AS UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

Hepburn & Norris, Esqs. Gerald A. Gleeson, Esq.

Docket entries

July 20, 1943—Complaint, filed.
July 20, 1943—Summons exit.
July 30, 1943—Appearance of Gerald A. Gleeson, Esq., for defendant, filed.
Aug. 11, 1943—Summons returned: "on July 20, 1943, served W. J. Rothensies and G. A. Gleeson, U. S. Atty." and "on July 20, 1943, served U. S. Atty. General and Commissioner of Internal Revenue by registered mail" and filed.
Aug. 11, 1943—Stipulation of counsel extending time for filing answer to November 17, 1943, and Order of Court approving same, filed. Noted 8/12/43.
Nov. 16, 1943—Stipulation of counsel extending time for filing answer to January 16, 1944, and Order of Court approving same, filed. Noted 11/17/43.
Dec. 15, 1943—Answer, filed.
Dec. 17, 1943—Order to place case on the Trial List, filed.
June 5, 1944—Trial—Witnesses sworn.
June 28, 1944—Testimony filed (2 Vol.).
Aug. 2, 1944—Plaintiff's requests for findings of fact and conclusions of law, filed.
Aug. 2, 1944—Argument sur P. & P. submitted on briefs. C. A. V.
Aug. 9, 1944—Defendant's requests for findings of fact and conclusions of law, filed.
2 Oct. 30, 1944—Opinion, Kirkpatrick, J., granting judgment for plaintiff, filed.
Oct. 30, 1944—Judgment in favor of plaintiff in sum of $229,805.34 with interest and costs, filed. 10/31/44 Noted & notice mailed.
Nov. 3, 1944—Certificate of Probable Cause, filed.

Nov. 29, 1944—Stipulation of counsel as to amendment to the answer, filed.
Nov. 29, 1944—Amendment to answer, filed.
Nov. 29, 1944—Agreed statement of facts, filed.
Jan. 26, 1945—Defendant's notice of Appeal, filed. 1/27/45 Copy to Hepburn & Norris.
Jan. 26, 1945—Copy of Clerk's Notice to U. S. Circuit Court of Appeals, filed.
Feb. 7, 1945—Designation of contents of record on appeal, filed.
Feb. 12, 1945—Order of Court extending time for filing record on appeal to Apr. 26, 1945. filed. 2/13/45 Noted & notice mailed.
Mar. 13, 1945—Amended designation of contents of record on appeal, filed.
Mar. 27, 1945—Stipulation of counsel as to filing one copy of record on appeal, filed.

3 In United States District Court

Title omitted.

Complaint

Filed July 20, 1943

This suit is brought by the plaintiff, The Electric Storage Battery Company, a corporation, against the defendant, Walter J. Rothensies, individually and as United States Collector of Internal Revenue for the First District of Pennsylvania, to recover the sum of Two Hundred and Twenty-nine Thousand, Eight Hundred and Five Dollars and Thirty-four Cents ($229,805.34), with interest, as hereinafter set forth, upon the cause of action of which the following is a statement.

For a first count and cause of action, plaintiff alleges as follows:

1. The plaintiff is a corporation organized and existing under the laws of the State of New Jersey, and during the times hereinafter mentioned maintained its principal office at Nineteenth Street and Allegheny Avenue, in the City and County of Philadelphia, Commonwealth of Pennsylvania.

4 2. The defendant was, at the time of the collections hereinafter mentioned, and still is, the United States Collector of Internal Revenue for the First District of Pennsylvania, which Internal Revenue District is situated in the Eastern District of Pennsylvania, of which District the defendant is a resident.

3. This is a proceeding of a civil nature for the recovery of an internal revenue tax erroneously and illegally assessed and col-

lected under the internal revenue laws, and the amount in controversy, exclusive of interest and costs, is the sum or value of Two Hundred and Twenty-nine Thousand, Eight Hundred and Five Dollars and Thirty-four Cents ($229,805.34).

4. The books of the plaintiff are kept on the accrual basis and its income tax returns and excess profits tax returns for all years referred to herein were prepared and filed on the accrual basis.

5. Each of the plaintiff's income tax returns and excess profits tax returns referred to herein has been audited and examined by the Bureau of Internal Revenue. The accrual basis of reporting income and deductions for all years referred to herein has been accepted by the Bureau of Internal Revenue as the method of accounting correctly reflecting net income.

6. In each calendar year during the period beginning February 25, 1919 and ending on February 28, 1926, the plaintiff made sales of portable electric storage batteries, all of which sales were made to persons other than manufacturers of automobile trucks, automobile wagons, automobiles or motor cycles, and on or before the last day of the calendar month then immediately succeeding each of the said months in which the said sales were made, in accordance with the requirements and upon the demand of the Collector of Internal Revenue for the First District of Pennsylvania, made a return in accordance with the provision of Section 900 of the United States Revenue Acts of 1918 and 1921, and of Section 600 of the United States Revenue Act of 1924, of the computation of manufacturer's exercise taxes at the rate of five per centum under the 1918 and 1921 Acts and two and one-half per centum under the 1924 Act, of the selling prices of the said portable electric storage batteries upon sales thereof made by the plaintiff in each immediately preceding calendar month. There is attached hereto, marked "Exhibit A", and made a part hereof, a statement consisting of three columns which sets forth in Column 1, the date of payment of the said taxes, in Column 2, the calendar month in which the sales were made, upon which the said taxes were based respectively, and in Column 3, the amounts of taxes which were paid upon the selling prices of the storage batteries sold during the said calendar months respectively, which amounts were not added separately on the invoices of the plaintiff to the purchasers of the said batteries, and which amounts were absorbed and paid by the plaintiff and were not passed on for payment to the said purchasers or any of them. The total amount of such taxes so paid by the plaintiff upon the demand of the Collector of Internal Revenue as aforesaid, as set forth in Column 3 of said Exhibit "A", is as follows:

Based on sales in the period from February 25, 1919 to May 31, 1922, not refunded to plaintiff	$912,978.57
Based on sales in the period from June 1, 1922 to February 28, 1926, refunded to plaintiff as stated in paragraph 9 hereof	825,151.52
Total	1,738,130.09

7. The amounts of the excise taxes paid as aforesaid by the plaintiff upon demand by the Collector of Internal Revenue, and after protest filed against such payment, were shown as a deduction from income on plaintiff's income tax returns for the respective years from 1919 to 1926, inclusive, the years in which such deductions would be applicable if the assessment of such excise taxes was not erroneous and illegal.

8. Suit for the collection of said sum of $825,151.52, as taxes paid under protest and erroneously and illegally collected, was entered by the plaintiff herein against Blakely D. McCaughn, individually and as Collector of Internal Revenue, as at June Term, 1928, No. 14008, at law, in the United States District Court in and for the Eastern District of Pennsylvania, and after due proceedings, judgment in favor of the plaintiff was entered and became final on May 1, 1933.

9. Thereafter, on October 15, 1935, the United States paid to the plaintiff the said amount of $825,151.52, plus interest of $570,363.83, in accordance with the said judgment.

10. On or about January 9, 1937, a Revenue Agent's
7 report covering an examination of the plaintiff's income tax return for the year 1935 was filed recommending the inclusion in the plaintiff's taxable income for the year 1935 of the amount of the refund of tax, $825,151.52, and interest thereon of $570,363.83, and in accordance therewith, on or about November 22, 1938, the plaintiff received from the defendant herein the Treasury Department form entitled "Notice and Demand for Income Tax", requiring payment of taxes as follows:

Additional income tax claimed for the year 1935	$188,140.56
Interest on above to November 18, 1938	30,195.27
Additional excess profits tax claimed for the year 1935	9,883.31
Interest on above to November 18, 1938	1,586.20
Total	229,805.34

11. The payment of the said income taxes and excess profits taxes, and interest, in the total amount of $229,805.34 was made by plaintiff on or about December 5, 1938 to the defendant herein, the Collector of Internal Revenue for the First District of Pennsylvania. This payment was made under protest and with notice to the Collector that refund of the payment would be claimed.

12. The plaintiff, on or about the 30th day of November, 1940, filed with the defendant, the Collector of Internal Revenue of the United States for the First District of Pennsylvania, a Claim for refund in the amount of $229,805.34. A true and correct copy of said Claim for Refund is attached hereto, made a part hereof, and marked "Exhibit B".

8

13. The said Claim for Refund, in amount of $229,805.34, was disallowed in full by the Commissioner of Internal Revenue of the United States, by a registered letter dated July 25, 1941, a true and correct copy of which is attached hereto and made a part hereof, and marked "Exhibit C".

14. The refund to the claimant by the United States of excise taxes in amount of $825,151.52, paid on or about October 15, 1935, did not accrue during the year 1935, which is the year for which additional income and excess profits taxes here in dispute were assessed.

15. The plaintiff being on an accrual basis avers that the inclusion in its income for the year 1935 of the amount of the cash payment refunding manufacturer's excise taxes and interest applicable to the years 1922 to 1926 as aforesaid, was erroneous and illegal; that the said payment did not constitute income for the year 1935, subject to the tax under the Sixteenth Amendment to the Constitution of the United States or the Acts of Congress, and that the said payment constituted a return of capital to plaintiff.

16. Prior to making the payments of excise tax as aforesaid, plaintiff protested that the assessment against the plaintiff of said excise taxes under said Acts was erroneous and illegal. On July 19, 1926 the plaintiff duly filed with the Collector of Internal Revenue for the First District of Pennsylvania a Claim for Refund of the said manufacturer's excise taxes erroneously and illegally collected from the plaintiff during the period from June 1, 1922 to February 28, 1926, in amount of $825,151.52, a copy of which Claim for Refund is attached hereto as "Exhibit D."

9

Prior to the filing and auditing of plaintiff's income tax returns for the years 1922 to 1926, inclusive, the Commissioner of Internal Revenue and the Collector of Internal Revenue for the First District of Pennsylvania were given notice of the fact that plaintiff protested against the collection from it of the said payments of manufacturer's excise taxes as described above, and of the fact that collection of said payments as taxes from plaintiff was erroneous and illegal, and the Commissioner of Internal Revenue and the Collector of Internal Revenue for the First District of Pennsylvania thereupon had full opportunity to include the amounts of said payments of taxes in the plaintiff's income for the years 1922 to 1926, inclusive.

17. The payment to the plaintiff by the United States of interest on excise taxes on or about October 15, 1935, in the amount of $570,363.83 (except as to the amount of $36,351.88 thereof, which represented interest earned in and accruable for the period from January 1, 1935 up to the date of payment, October 15, 1935), did not constitute income for the year 1935, subject to tax under the Sixteenth Amendment to the Constitution of the United States, or the Acts of Congress; did not accrue during the year 1935; was not earned during the year 1935, and was not applicable to the year 1935.

18. Prior to the filing and auditing of plaintiff's income tax returns for the years 1922 to 1934, inclusive, the Commissioner of Internal Revenue and the Collector of Internal Revenue for the First District of Pennsylvania were given notice of the fact that plaintiff protested against the collection from it of the said payments of manufacturer's excise taxes as described above,
10 and of the fact that collection of said payments as taxes from plaintiff was erroneous and illegal, and the Commissioner of Internal Revenue and the Collector of Internal Revenue for the First District of Pennsylvania thereupon had full opportunity to include in plaintiff's income for each of the said years the amount of the interest earned in and accruable for each of said years respectively, and applicable to each of the said years respectively.

19. The inclusion in the plaintiff's taxable income for the year 1935 of the amount of the refund of manufacturer's excise taxes and interest as described above, is not good accounting practice, is not in accordance with the accrual theory, and produces a distortion of plaintiff's income for the said year.

For a second count and cause of action plaintiff repeats the allegations of paragraphs numbered 1 to 19 inclusive, and in addition alleges:

20. During the period from April 28, 1919, until June 30, 1922, excise taxes as described in paragraph 6 of this Complaint for each month during the entire period, were paid to the Collector of Internal Revenue for the First District of Pennsylvania at Philadelphia, and the total amount of said excise taxes on portable electric storage batteries for the period from April 1, 1919 to May 31, 1922 was $912,978.57, and said excise taxes so paid, as aforesaid on portable electric storage batteries were illegally assessed and collected. Said amount of taxes so paid for
11 the period from April 1, 1919 to May 31, 1922 was not legally refundable to plaintiff by reason of the fact that

the Statute of Limitations intervened as a bar against the filing of Claim for Refund therefor.

21. It is the right of the plaintiff to have set off against the amount of additional income tax and excess profits tax assessed against plaintiff for the year 1935 or which may be claimed to be due from plaintiff for any year prior to 1935 on account of the payment to plaintiff of the refund of excise tax on its portable electric storage batteries, the amount of excise tax on its portable electric storage batteries paid by plaintiff for the period from February 25, 1919 to June 30, 1922, which excise taxes for the said period from February 25, 1919 to June 30, 1922 were illegally assessed and collected, but have not been refunded, to the plaintiff, as hereinbefore set forth. Against any deficiency for income tax on the amount of such excise taxes, as actually were refunded to plaintiff, the plaintiff is entitled to recoup the amounts of excise taxes illegally exacted, the refund of which to plaintiff was barred by the Statute of Limitations. The said set-off and recoupment claim, and any such income tax deficiency had a common origin in the erroneous application of the Excise Tax Act.

The following paragraphs apply to both the first and second counts and causes of action:

22. The defendant, individually, and as Collector of Internal Revenue for the First District of Pennsylvania, was and is without authority under the Acts of Congress, or otherwise, to demand, collect and receive the aforesaid sum of $229,805.34
12 paid by plaintiff to defendant, and said sum was erroneously and illegally demanded, collected and received by the defendant from the plaintiff, and was not due from the plaintiff to the defendant at the time said sum was collected and received by the defendant, or at any other time, either before or since that date.

23. No part of said sum of $229,805.34 has been remitted, refunded, or repaid to the plaintiff or to any person or corporation on its account by the defendant.

Wherefore, plaintiff demands judgment against the defendant for the said sum of $229,805.34, together with interest thereon, according to law, and the costs and disbursements of this action.

(Sgd.) CHARLES C. NORRIS, Jr.,
(Sgd.) PHILIP DECHERT,
Office and Post-office address,
1500 Walnut Street, Philadelphia 2, Pennsylvania,
Attorneys for Plaintiff.

13 [*Duly sworn to by H. C. Allan; jurat omitted in printing.*]

14 *Exhibit A to complaint*

Date of payment of the excise taxes	Calendar month in which the sales were made upon which the said taxes were based respectively	The amounts of taxes paid
April 28, 1919	March 1919	$15,163.69
July 18, 1919	April 1919	8,385.58
July 18, 1919	May 1919	20,313.82
July 31, 1919	June 1919	19,089.39
August 27, 1919	July 1919	22,462.81
September 30, 1919	August 1919	22,181.21
October 31, 1919	September 1919	22,505.09
November 29, 1919	October 1919	24,785.40
December 31, 1919	November 1919	24,362.78
January 31, 1920	December 1919	27,309.85
February 28, 1920	January 1920	23,078.43
March 31, 1920	February 1920	19,872.40
April 30, 1920	March 1920	31,070.04
May 29, 1920	April 1920	30,935.33
June 30, 1920	May 1920	31,290.22
July 29, 1920	June 1920	27,629.48
August 31, 1920	July 1920	27,485.81
September 30, 1920	August 1920	23,384.98
October 29, 1920	September 1920	28,068.01
November 30, 1920	October 1920	23,556.89
December 31, 1920	November 1920	22,759.81
January 31, 1921	December 1920	16,551.52
February 29, 1921	January 1921	17,598.41
March 31, 1921	February 1921	18,690.13
April 30, 1921	March 1921	34,113.84
May 31, 1921	April 1921	28,535.80
June 30, 1921	May 1921	22,318.85
July 28, 1921	June 1921	20,336.72
August 30, 1921	July 1921	22,757.61
September 30, 1921	August 1921	24,351.97
October 31, 1921	September 1921	28,433.69
November 30, 1921	October 1921	35,709.36
December 30, 1921	November 1921	24,568.49
January 30, 1922	December 1921	20,817.98
February 25, 1922	January 1922	18,252.38
March 27, 1922	February 1922	17,767.29
April 27, 1922	March 1922	20,814.38
May 25, 1922	April 1922	26,860.64
June 27, 1922	May 1922	22,154.48
(Subtotal of taxes paid based on sales up to May 31, 1922)		912,978.57
July 31, 1922	June 1922	16,888.40
September 1, 1922	July 1922	17,435.60
October 2, 1922	August 1922	21,913.09
November 1, 1922	September 1922	24,511.93
December 1, 1922	October 1922	26,138.58
January 2, 1923	November 1922	22,866.90
February 1, 1923	December 1922	23,131.76
March 1, 1923	January 1923	18,952.99
Carried forward		171,839.84
April 2, 1923	February 1923	15,648.86
May 2, 1923	March 1923	23,135.86
June 1, 1923	April 1923	26,178.70
July 2, 1923	May 1923	18,930.28
August 2, 1923	June 1923	16,820.53
September 1, 1923	July 1923	18,178.64
October 1, 1923	August 1923	24,550.45
November 1, 1923	September 1923	29,718.66
December 3, 1923	October 1923	32,022.12
January 2, 1924	November 1923	27,932.39
February 1, 1924	December 1923	20,790.26
March 1, 1924	January 1924	25,819.47
April 1, 1924	February 1924	20,709.41
May 1, 1924	March 1924	23,512.71
June 3, 1924	April 1924	24,716.03
July 1, 1924	May 1924	16,960.60
August 1, 1924	June 1924	16,077.53
September 3, 1924	July 1924	10,853.89
October 1, 1924	August 1924	11,847.48
November 1, 1924	September 1924	14,823.45
December 2, 1924	October 1924	15,968.89

Date of payment of the excise taxes	Calendar month in which the sales were made upon which the said taxes were based respectively	The amounts of taxes paid
January 2, 1925	November 1924	15,027.65
February 2, 1925	December 1924	17,584.40
March 2, 1925	January 1925	13,263.06
April 1, 1925	February 1925	9,692.25
May 2, 1925	March 1925	11,281.36
June 3, 1925	April 1925	9,762.37
July 1, 1925	May 1925	10,089.95
August 3, 1925	June 1925	9,253.81
September 2, 1925	July 1925	12,951.86
October 1, 1925	August 1925	13,808.32
November 4, 1925	September 1925	17,658.98
December 1, 1925	October 1925	22,155.49
January 2, 1926	November 1925	18,134.45
February 2, 1926	December 1925	16,972.81
March 2, 1926	January 1926	13,182.24
April 3, 1926	February 1926	7,591.46
(Subtotal of taxes paid based on sales in the period from June 1, 1922 to February 28, 1926).		825,151.52
Grand total of taxes paid		1,738,280.09

16 *Exhibit "B" to complaint*

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

Collector's stamp (date received), received No. 30, 1940, 1st Dist. Penna.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☒ Refund of tax illegally collected.

☐ Refund of amount paid for stamps unused, or used in error or excess.

☐ Abatement of tax assessed (not applicable to estate or income taxes).

STATE OF PENNSYLVANIA,

County of Philadelphia, ss:

Name of taxpayer or purchaser of stamps: Electric Storage Battery Company; business address, 19th and Allegheny Avenues, Philadelphia, Pennsylvania; residence: —.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: First District of Pennsylvania.

2. Period (if for income tax, make separate form for each taxable year) from January 1, 1935, to December 31, 1935.

3. Character of assessment or tax: Additional Federal Corporation Income Tax and Excess Profits Tax.

4. Amount of assessment: $229,805.34; dates of payment: December 3, 1938.

5. Date stamps were purchased from the Government: —.

6. Amount to be refunded: $229,805.34.

7. Amount to be abated (not applicable to income or estate taxes): —.

8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Act of 1938, on December 3, 1940.

The deponent verily believes that this claim should be allowed for the following reasons:

See statement attached, which is made a part hereof.

[CORPORATE SEAL] ELECTRIC STORAGE BATTERY COMPANY.
(Sgd.) R. C. NORBERG.

Sworn to and subscribed before me this 29th day of November 1940.

[NOTARIAL SEAL] (Sgd.) EARL W. WILLIAMS,
Notary Public.

17 STATEMENT TO ACCOMPANY CLAIM FOR REFUND OF THE ELECTRIC STORAGE BATTERY COMPANY FOR ADDITIONAL INCOME TAX ILLEGALLY ASSESSED AGAINST AND COLLECTED FROM SAID COMPANY FOR THE CALENDAR YEAR 1935

The Electric Storage Battery Company (herein called the "claimant") is a corporation organized and existing under the laws of the State of New Jersey and maintaining manufacturing plant and principal place of business at Allegheny Avenue and 19th Street, in the City of Philadelphia, Commonwealth of Pennsylvania. The books of the claimant are kept on the accrual basis and its income tax returns for all years referred to herein were prepared and filed on the accrual basis. Each of said returns has been carefully audited by the Bureau of Internal Revenue.

In each calendar year during the period beginning June 1, 1922, and ending on February 28, 1926, the claimant made sales of portable electric storage batteries, all of which sales were made to persons other than manufacturers of automobile trucks, automobile wagons, automobiles or motorcycles, and on or before the last day of the calendar month then immediately succeeding each of the said months in which the said sales were made, in accordance with the requirements and upon the demand of Blakely D. McCaughn, Collector of Internal Revenue for the First District of Pennsylvania, made a return in accordance with the provisions of Title IX, § 900, of the United States Revenue Act of 1921, and of Title VI. § 600, of the United States Revenue Act of 1924, of

the computation of manufacturer's excise taxes at the rate of five per centum under the 1921 Act and two and one-half per centum under the 1924 Act, of the selling prices of the said portable electric storage batteries upon sales thereof made
18 by the claimant in each immediately preceding calendar month. The total taxes so paid during the said period amounted in the aggregate to the sum of $973,532.57. There is attached hereto, marked "Exhibit A" and made a part hereof a statement consisting of five columns which sets forth in Column 1, the date of payment of the said taxes, in Column 2, the calendar month in which the sales were made upon which the said taxes were based respectively, in Column 3, the amount of taxes paid upon the selling prices of the storage batteries sold during the said calendar months respectively, in Column 4, the amount of the said taxes which were added separately on the invoices of the claimant to the purchasers of the said storage batteries, and for which the claimant was therefore reimbursed, and in Column 5, the amounts of the said taxes which were not added separately on the invoices of the claimant to the purchasers of the said batteries, which sums were absorbed and paid by the claimant and were not passed on for payment to the said purchasers or any of them. The total amount of the taxes paid by the claimant upon the demand of the Collector of Internal Revenue as aforesaid, as set forth in Column 5 of said Exhibit "A" is $825,151.52, and the total amount of the taxes paid by the claimant upon the demand of the Collector of Internal Revenue, as aforesaid, as set forth in Column 4 of said Exhibit "A" is $148,381.05.

Prior to making the payments as aforesaid claimant protested by telegram, by letter, and verbally that the assessment of taxes under said acts against the claimant was erroneous and illegal.

On July 19, 1926, the claimant duly filed with the Commissioner of Internal Revenue of the United States a Claim for Refund of the said manufacturer's excise taxes erroneously and illegally collected from the claimant during the period specified above.

On June 28, 1928, the claimant filed suit in the District
19 Court of the United States for the Eastern District of Pennsylvania against Blakely D. McCaughn, formerly Collector of Internal Revenue, Docket No. 14008, At Law, June Term, 1928. On April 28, 1931, an opinion was filed by Judge Kirkpatrick granting judgment in favor of claimant and on October 13, 1931, judgment was entered in favor of the claimant.

On November 10, 1931, an appeal was filed by the defendant in this case to the United States Circuit Court of Appeals for the Third Circuit, which appeal was docketed in the said Circuit Court as March Term, 1932, No. 4752. On January 31, 1933, an opinion was filed by the said Circuit Court affirming the judgment of the

District Court, and on May 2, 1933, the mandate was issued by the said Circuit Court to the said District Court affirming the judgment of the District Court in favor of the claimant. Said judgment in favor of the claimant therefore became final on May 1, 1933.

After the filing of the said mandate and the entry of final judgment in favor of the claimant there was not any dispute at any time as to the right of the claimant to collect in full from the United States the said amount of $825,151.52, representing tax paid by claimant and not added to the invoices to the purchasers.

Thereafter, on October 15, 1935, the United States paid to the claimant the said amount of $825,151.52 plus interest of $570,363.83 in accordance with the said judgment.

The official records of the United States District Court for the Eastern District of Pennsylvania, Docket No. 14008, and the United States Circuit Court of Appeals for the Third Circuit, Docket No. 4752, in this case are specifically referred to herein and are included herein by reference. The Decision of the District Court is reported in 52 Federal (2nd) 205 and the decision of the Circuit Court of Appeals is reported in 63 Federal (2nd) 715.

20 On or about January 9, 1937, a Revenue Agent's report covering an examination of the claimant's income tax return for the year 1935 was filed recommending the inclusion in the claimant's taxable income for the year 1935 of the amount of the refund of tax, $825,151.52, and interest of $570,363.83. Subsequently, on or about November 22, 1938, the claimant received Treasury Department Form No. 7658—"Notice and Demand for Income Tax", requiring the payment of taxes as follows:

Additional income tax claimed for the year 1935	$188,140.56
Interest on above to November 18, 1938	30,195.27
Additional excess profits tax claimed for the year 1935	9,883.31
Interest on above to November 18, 1938	1,586.20
	229,805.34

The payment of the said income taxes and excess profits taxes, and interest, in the total amount of $229,805.34, was made by claimant on December 3, 1938, to the Collector of Internal Revenue for the First District of Pennsylvania. This payment was made under protest and with notice to the Collector that refund of the payment would be claimed. This claim is for refund of the said income taxes, excess profits taxes, and interest so paid, and for interest on the amount of the payment according to law.

The claimant believes that the inclusion in its taxable income for the year 1935 of the amount of the refund of manufacturer's excise taxes and interest as described above, was erroneous and illegal.

The refund to the claimant by the United States of excise taxes in amount of $825,151.52, paid on or about October 15, 1935, did not constitute income subject to tax under the Sixteenth
21 Amendment to the Constitution to the United States or the Acts of Congress.

The refund to the claimant by the United States of excise taxes in amount of $825,151.52, paid on or about October 15, 1935, constituted a return of capital.

The refund to the claimant by the United States of excise taxes in amount of $825,151.52, paid on or about October 15, 1935, did not accrue during the year 1935 which is the year here in dispute.

Prior to the filing and auditing of claimant's income tax returns for the years 1922 to 1926, inclusive, the Commissioner of Internal Revenue and the Collector of Internal Revenue for the First District of Pennsylvania were given notice of the fact that claimant protested against the collection from it of the said manufacturer's excise taxes as described above and of the fact that collection of said taxes from claimant was illegal, and the Commissioner of Internal Revenue and the Collector of Internal Revenue for the First District of Pennsylvania thereupon had full opportunity to include the amounts of said taxes in the claimant's income for the years 1922 to 1926, inclusive.

The payment to the claimant by the United States of interest on excise taxes on or about October 15, 1935, in the amount of $570,363.83, did not constitute income subject to tax under the Sixteenth Amendment to the Constitution of the United States, or the Acts of Congress.

The payment to the claimant by the United States of interest on excise taxes on or about October 15, 1935, in the amount of $570,363.83, did not accrue during the year 1935.

The payment to the claimant by the United States of interest on excise taxes on or about October 15, 1935, in the amount of $570,-363.83, was not a payment for interest earned during the year 1935 nor applicable thereto (except as to the amount of interest earned from January 1, 1935, up to the date of payment—October 15, 1935).

22 Prior to the filing and auditing of claimant's income tax returns for the years 1922 to 1934, inclusive, the Commissioner of Internal Revenue and the Collector of Internal Revenue for the First District of Pennsylvania were given notice of the fact that claimant protested against the collection from it of the said manufacturer's excise taxes as described above, and of the fact that collection of said taxes from claimant was illegal and the Commissioner of Internal Revenue and/or the Collector of Internal Revenue for the First District of Pennsylvania thereupon had full opportunity to include in claimant's income for

each of the said years the amount of the interest earned during each of said years respectively, and applicable to each of the said years respectively.

The inclusion in the claimant's taxable income for the year 1935 of the amount of the refund of manufacturer's excise taxes and interest as described above, is not good accounting practice, is not in accordance with the accrual theory, and produces a distortion of claimant's income for the said year.

The inclusion in the claimant's taxable income for the year 1935 of the amount of the refund of manufacturer's excise taxes and interest as described above, is not in accordance with the regulations and rulings of the Bureau of Internal Revenue which were in effect at the time and produces an unfair result to the claimant. The exact amount of the refund to the penny was always fixed and definite from the time when the manufacturer's excise taxes were originally paid (the years 1922 to 1926 inclusive). The amount of the refund of the said manufacturer's excise taxes and the right to the refund became fixed and definite long before 1935. The judgment became final in 1933, and thereafter could not have been collaterally attacked in any way.

It is improper accounting and contrary to the accrual theory to treat an item as income or as a deduction in one year, when the amount thereof and all rights with respect thereto have become fixed and definite in a prior year, as in this case.

23 The inclusion in the claimant's taxable income for the year 1935 of the amount of the refund of manufacturer's excise tax and interest as described above is contrary to the Constitution, and the Internal Revenue laws of the United States, and to the rulings and regulations of the Bureau of Internal Revenue. The claimant therefore believes that the additional income tax and excess profits tax paid by claimant for the year 1935 as described above, should be refunded.

24 SUPPLEMENTARY STATEMENT TO ACCOMPANY CLAIM FOR REFUND OF THE ELECTRIC STORAGE BATTERY COMPANY FOR ADDITIONAL INCOME TAX ILLEGALLY ASSESSED AND COLLECTED FROM SAID COMPANY FOR THE CALENDAR YEAR 1935, FILED NOVEMBER 30, 1940

In the official Record in the United States District Court for the Eastern District of Pennsylvania in case entitled The Electric Storage Battery Company, a corporation, Plaintiff, vs. Blakely D. McCaughn, formerly Collector of Internal Revenue of the United States for the First District of Pennsylvania, Defendant, June Term, 1938, Docket No. 14008, and in the Record in the United States Circuit Court of Appeals for the Third Circuit in the case of Blakely D. McCaughn, formerly Collector of Internal

Revenue, Appellant vs. The Electric Storage Battery Company, Appellee, March Term, 1932. Docket No. 4752, both of which Records are included by reference in this Claim, there is set forth, as a part of the Claim for Refund, a copy of a letter from The Electric Storage Battery Company to "Treasury Department, Commissioner of Internal Revenue, Washington, D. C., ST-WED, R. M. Estes, Deputy Commissioner" dated November 14, 1924, which sets forth the reasons for the claim that the portable storage batteries in question were not subjected to the excise taxes which had been assessed upon the sales thereof. The first payment of said taxes was made April 28, 1919, for the period from February 25, 1919 to March 31, 1919, both inclusive, upon gross sales subject to tax during the said period of $303,273.72, the said payment of tax on April 28, 1919 being in the amount of $15,163.69. Thereafter, during the period from April 28, 1919, until June 30, 1922, said excise taxes for each month during the entire period were paid to the Collector of Internal Revenue for the First District of Pennsylvania at Philadelphia, and the total amount of said taxes for the period beginning April 1, 1919 to May 31 1922
25 exceeded the sum of $229,805.34, and said taxes so paid as aforesaid were illegally assessed and collected, as decided in the Opinions and Judgments of the United States District Court for the Eastern District of Pennsylvania and the United States Circuit Court of Appeals for the Third Circuit, referred to above. However, said amount of taxes was not legally refundable to The Electric Storage Battery Company by reason of the fact that the Statute of Limitations intervened as a bar against the filing of Claim for Refund therefor.

Under the decision of the United States Circuit Court of Appeals for the Sixth Circuit in Dixie Margerine Co., Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 8204, it is held that in connection with a refund of illegally collected taxes, where similar taxes were unrefunded because of the Statute of Limitations, against the deficiency for income tax on the amount of such taxes as actually were refunded, the taxpayer is entitled to recoup the amounts of excise tax illegally exacted, the refund of which was barred by the Statute of Limitations. The recoupment claim and the deficiency assessment had a common origin in the erroneous application of the Act. See similar contentions in Bull vs. United States, 295 U. S. 247; Crosset Lumber Co. vs. United States 87 Fed. (2d) 930; Stone vs. White, 301 U. S. 532 and Peterson vs. Feyereisen, 203 Wis. 294.

In connection with 1935 income tax of The Electric Storage Battery Company, the Commissioner of Internal Revenue should set off against the amount of additional income tax claimed for the

said year, on account of the refund of excise tax on portable storage batteries, the amount of excise tax on similar portable electric storage batteries paid for the period from February 25, 1919 to June 30, 1922, which excise taxes for the said period were illegally assessed and collected, but have not been refunded, to the claimant herein, The Electric Storage Battery Company.

26 The excise taxes referred to above were alleged by the Commissioner of Internal Revenue to be due under Section 900, sub-section (3) of the Revenue Act of 1918, Title IX, Section 900, Sub-section (3) of the Revenue Act of 1921 and Title VI, Section 600, sub-section (3) of the Revenue Act of 1924.

27 *Exhibit A*

I Date paid as per collector's endorsements on checks	II Month in which sales made	III Amount of taxes paid	IV Amount of tax added to invoice to purchaser	V Amount of tax not added to invoice to purchaser
July 31, 1922	June 1922	$20,750.15	$3,861.75	$16,888.40
September 1, 1922	July 1922	20,904.09	3,528.49	17,435.60
October 2, 1922	August 1922	25,262.34	3,348.65	21,913.69
November 1, 1922	September 1922	28,855.64	4,343.71	24,511.93
December 1, 1922	October 1922	30,681.87	4,543.29	26,138.58
January 2, 1923	November 1922	27,588.65	4,721.75	22,866.90
February 1, 1923	December 1922	27,135.65	4,003.89	23,131.76
March 1, 1923	January 1923	23,111.56	4,158.58	18,952.98
April 2, 1923	February 1923	19,309.31	3,660.45	15,648.86
May 2, 1923	March 1923	27,360.50	4,224.64	23,135.86
June 1, 1923	April 1923	30,663.24	4,484.54	26,178.70
July 2, 1923	May 1923	24,745.81	5,815.53	18,930.28
August 2, 1923	June 1923	21,297.78	4,477.25	16,820.53
September 1, 1923	July 1923	22,377.41	4,201.77	18,175.64
October 1, 1923	August 1923	30,219.86	5,669.41	24,550.45
November 1, 1923	September 1923	33,921.42	4,202.76	29,718.66
December 3, 1923	October 1923	37,907.72	5,885.60	32,022.12
January 2, 1924	November 1923	32,646.71	4,714.32	27,932.39
February 1, 1924	December 1923	25,405.06	4,614.80	20,790.26
March 1, 1924	January 1924	28,394.76	3,575.29	25,819.47
April 1, 1924	February 1924	24,512.81	3,803.40	20,709.41
May 1, 1924	March 1924	28,399.85	4,887.14	23,512.71
June 3, 1924	April 1924	29,246.94	4,530.91	24,716.03
July 1, 1924	May 1924	20,858.35	3,887.75	18,920.60
August 1, 1924	June 1924	18,777.06	2,699.53	15,077.53
September 3, 1924	July 1924	11,938.24	1,084.35	10,853.89
October 1, 1924	August 1924	13,044.63	1,197.15	11,847.48
November 1, 1924	September 1924	16,898.57	2,075.12	14,823.45
December 2, 1924	October 1924	18,212.35	2,245.46	15,966.89
January 2, 1925	November 1924	16,319.13	1,291.48	15,027.65
February 2, 1925	December 1924	19,704.88	2,120.48	17,584.40
March 2, 1925	January 1925	15,464.49	2,201.43	13,263.06
April 1, 1925	February 1925	11,751.17	2,058.92	9,692.25
May 2, 1925	March 1925	13,435.65	2,154.29	11,281.36
June 3, 1925	April 1925	10,999.77	1,237.40	9,762.37
July 1, 1925	May 1925	11,818.74	1,748.79	10,069.95
August 3, 1925	June 1925	11,528.05	2,274.24	9,253.81
September 2, 1925	July 1925	15,618.83	2,666.97	12,951.86
October 1, 1925	August 1925	12,367.67	1,859.34	13,508.33
November 4, 1925	September 1925	19,885.01	2,226.03	17,658.98
December 1, 1925	October 1925	25,838.60	3,683.11	22,155.49
January 2, 1926	November 1925	21,264.97	3,130.52	18,134.45
February 2, 1926	December 1925	18,877.46	1,904.65	16,972.81
March 2, 1926	January 1926	14,892.72	1,710.48	13,182.24
April 3, 1926	February 1926	9,277.10	1,685.64	7,591.46
Total		973,532.57	148,381.05	825,151.52

28

Exhibit "C" to complaint

TREASURY DEPARTMENT,
Washington, July 25, 1941.

OFFICE OF COMMISSIONER OF INTERNAL REVENUE

Address Reply to Commissioner of Internal Revenue and Refer to
IT:C1:CC:4-CCP

In re: Claim for refund of $229,805.34 For the year 1935

ELECTRIC STORAGE BATTERY CO.,
19th Street and Allegheny Avenue,
Philadelphia, Pennsylvania.

SIRS: Reference is made to the revenue agent's report upon an investigation of your tax liability dated Apr. 19, 1941, a copy of which was forwarded you, wherein you were informed that the claim for refund indicated above will be disallowed.

In accordance with the provisions of existing internal revenue law, notice is hereby given of the disallowance of your claim in full.

Respectfully,

GUY T. HELVERING, *Commissioner,*
By F. MOONEY, *Deputy Commissioner.*

In United States District Court

43

Answer

Filed December 15, 1943

Comes now the defendant, Walter J. Rothensies, Collector of Internal Revenue for the First District of Pennsylvania, by his attorneys, Gerald A. Gleeson, United States Attorney in and for the Eastern District of Pennsylvania, and Thomas J. Curtin, Assistant United States Attorney in and for said District, and answers the Complaint herein as follows:

FIRST COUNT AND CAUSE OF ACTION

1. Admits the allegations contained in Paragraphs 1, 4, 5, 8, 9, 10, 12, and 13 contained in the first count and cause of action of the Complaint.

2. Answering the allegations made in Paragraphs 2 and 3 of the first count and cause of action of the Complaint, the defend-

ant admits that he is the collector of Internal Revenue for the First District of Pennsylvania, which is situated in the Eastern District of Pennsylvania and that plaintiff made payment to him of the sum of $229,805.34 involved herein, but the defendant avers upon information and belief that the amounts of the excise
44 taxes described in Paragraphs 6 and 7 of the first count and cause of action of the complaint were paid to former Collectors of Internal Revenue for the same collection district, to wit: Ephraim Lederer, who was Collector from December 1, 1913, to July 31, 1921, and Blakely D. McCaughn, who was Collector from August 1, 1921, to December 31, 1927.

Further answering the allegations made in Paragraph 3 of the first count and cause of action of the complaint, the defendant admits that this is a proceeding of a civil nature for the recovery of Internal Revenue taxes and interest in the amount of $229,803.34, but he denies that said taxes and interest were erroneously and illegally assessed and collected.

3. Answering the allegations made in Paragraph 6 of the first count and cause of action of the complaint, the defendant admits that plaintiff made sales of portable electric storage batteries in each calendar year during the period which began on February 25, 1919, and ended on February 28, 1926, but the defendant denies that the excise taxes described therein were paid to him, and defendant further avers that he is without sufficient knowledge and information to form a belief as to the truth and accuracy of the other allegations contained in Paragraph 6 of the first count and cause of action of the complaint, and therefore, denies each and every allegation therein made except the allegation which is specifically admitted herein.

4. Answering the allegations made in Paragraph 7 of the first count and cause of action of the complaint, the defendant admits that plaintiff took as a deduction in computing its taxable net income reported in its federal income tax returns for
45 each of the calendar years 1919 to 1926, inclusive, the amounts of excise taxes described in Paragraph 6 of the first count and cause of action of the complaint, but the defendant denies the other allegations made in Paragraph 7 of the first count and cause of action of the complaint.

5. Answering the allegations contained in paragraph 11 of the first count and cause of action of the complaint, the defendant avers that the income taxes and excess profits taxes, with interest, in the total amount of $229,805.34, were paid on December 3, 1938, instead of on December 5, 1938, as alleged therein.

6. Denies the allegations contained in Paragraphs 14, 15, 16, 17, 18 and 19 of the first count and cause of action of the complaint.

SECOND COUNT AND CAUSE OF ACTION

7. Answering the allegations contained in the unnumbered paragraph immediately preceding the paragraph numbered 20 of the complaint, wherein plaintiff, for a second count and cause of action, repeats by references the allegations of paragraphs numbered 1 to 19, inclusive, of the complaint, the defendant realleges and repeats each and every admission and denial hereinbefore made with respect to paragraphs numbered 1 to 19, inclusive, of the complaint as though the same were here repeated in full.

8. Answering the allegations contained in Paragraph 20 of the second count and cause of action of the complaint, the defendant avers he is without sufficient knowledge and information to form a belief as to the truth and accuracy thereof,
46 and, therefore, denies each and every allegation therein made, except that the defendant admits that the excise taxes in the amount of $912,978.57 paid by plaintiff on sales of portable electric storage batteries for the period from April 1, 1919, to May 31, 1922, are not legally refundable to it by reason of the fact that the statute of limitations has intervened as a bar against the filing of a claim for refund thereof.

9. (a) Denies the allegations contained in Paragraph 21 of the second count and cause of action of the complaint.

(b) For a complete defense to the allegations contained in Paragraph 21 of the second count and cause of action of the complaint, the defendant avers that such allegations fail to state a claim against him upon which relief can be granted.

(c) For a further defense to the allegations made in Paragraph 21 of the second count and cause of action of the complaint, the defendant avers that by reason of the provisions of Section 3226 of the United States Revised Statutes, as amended, and/or Section 3772 of the Internal Revenue Code, the court lacks jurisdiction of the subject matter of the alleged overpayment of excise taxes for the period from February 25, 1919, to June 30, 1922, because no claim for the refund thereof setting forth the grounds upon which the plaintiff seeks to recover said taxes was presented to the Commissioner of Internal Revenue, as required by Section 3228, United States Revised Statutes, as amended by Section 1316 of the Revenue Act of 1921, c. 136, 42 Stat. 227.

10. Denies the allegations contained in Paragraph 22 of the complaint which plaintiff states apply to both the first
47 and second counts and causes of action of the complaint.

11. Admits the allegations contained in Paragraph 23 of the complaint which the plaintiff states apply to both the first and second counts and causes of action of the complaint.

Wherefore, defendant prays that the complaint be dismissed and that the defendant be given judgment in his favor against the plaintiff, together with the costs and disbursements herein expended by the defendant.

(S) GERALD A. GLEESON,
United States Attorney.
(S) THOMAS J. CURTIN,
Assistant United States Attorney.

48 In United States District Court

(Title omitted.)

Stipulation as to amendment to answer

Filed Nov. 29, 1944

And now, to wit: this — day of June, A. D., 1944, it is Stipulated and Agreed that the defendant be and hereby is permitted to file an amendment to the answer, heretofore filed.

(S.) CHARLES C. NORRIS, JR.,
Attorney for Plaintiff.
(S.) Gerald A. Gleeson,
GERALD A. GLEESON,
United States Attorney.
(S.) Thomas J. Curtin,
THOMAS J. CURTIN,
Assistant United States Attorney.

49 In United States District Court

(Title omitted.)

Amendment to answer

Filed Nov. 29, 1944

1. Defendant withdraws its admission that the books of the plaintiff were kept on the accrual basis for the entire period involved, but avers on the other hand that the books were kept on the cash receipts and disbursements basis during said period.

As a further affirmative defense, defendant avers:

1. The plaintiff received a deduction from its income for the years 1919 to 1922 inclusive in ascertaining its income tax liability in the amount of $912,978.57, upon which the defendant in equity should have received additional income taxes in the sum of $178,

691.49, and which additional taxes plus interest the defendant should be allowed to set off and recoup against any recovery by the plaintiff.

2. The plaintiff received a deduction from its income for the years 1922 to 1926 inclusive in ascertaining its income tax liability in the amount of $825,151.52, upon which the defendant, in equity, should have received additional income taxes in the
50 sum of $139,668.83, and which additional taxes plus interest the defendant should be allowed to set off and recoup against any recovery by the plaintiff.

(S.) GERALD A. GLEESON,
United States Attorney.
(S.) THOMAS J. CURTIN,
Assistant United States Attorney.

51 In United States District Court

[Title omitted.]

Agreed statement of facts

Filed Nov. 29, 1944

It is hereby stipulated by and between the parties hereto, by their respective counsel, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the rights of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true, provided that either party hereto may object to the admission of any fact herein stipulated upon the ground of its incompetency, immateriality and irrelevancy.

1. The Electric Storage Battery Company, during the times hereinafter mentioned, was and now is a corporation organized and existing under the laws of the State of New Jersey, and
52 during all of the years hereinafter mentioned, its principal office was in the City of Philadelphia, County of Philadelphia, Commonwealth of Pennsylvania.

2. The defendant was at the time of the collection of the sum of $229,805.34 herein mentioned, and for the recovery of which this suit is brought, and still is, United States Collector of Internal Revenue for the First District of Pennsylvania, and a citizen and resident of the Eastern District of Pennsylvania.

3. During the period beginning February 25, 1919, and ending on February 28, 1926, the plaintiff was engaged in the business of manufacturing and selling electric storage batteries.

4. Each of the plaintiff's income tax returns and excess profits tax returns for the years 1919 to 1935, inclusive, have been audited and examined by the representatives of the Bureau of Internal Revenue.

5. In each month during the period beginning June 1, 1922, and ending February 28, 1926, the plaintiff made sales of electric storage batteries and made monthly returns of excise tax thereon and paid taxes thereon amounting to $825,151.52, in accordance with the provisions of Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924. All of such sales were made to persons other than manufacturers of automobile trucks, automobile wagons, automobiles or motorcycles.

53 6. The payments of the excise taxes in question between July 31, 1922, and April 3, 1926, were made to the then Collector of Internal Revenue for said First District of Pennsylvania, who was the predecessor of the defendant herein.

7. The said excise taxes amounting to the sum of $825,151.52 were paid between July 31, 1922, and April 3, 1926, by the plaintiff upon demand of the then Collector of Internal Revenue. Under date of April 28, 1919, the plaintiff herein addressed a letter to the then Collector of Internal Revenue at Philadelphia, Pennsylvania, in which it protested the payment of excise tax for the period from February 25 to March 31, 1919, both inclusive. A true copy of said letter of April 28, 1919, is attached hereto and made a part hereof, as Exhibit "3." In the oral testimony of Mr. Augustus Stoughton in the case of the plaintiff vs. McCaughn, in the United States District Court for the Eastern District of Pennsylvania, June Term, 1928, he testified that he proceeded to Washington, D. C., and conferred with the then Commissioner of Internal Revenue concerning the payment of excise taxes assessed against the plaintiff herein, described in the letter of April 28, 1919, and protested to the Commissioner against the assessment and collection thereof; and upon return to Philadelphia, advised

54 the taxpayer to pay the tax and to say that it was paid under intention to avoid penalties, and to make a return therefor, and that was done. Further than that, the record of the evidence and documentary proof in the excise tax hearing fails to disclose any further protest made from time to time with respect to the assessments and payments of excise taxes by this plaintiff for subsequent periods up to and including the excise taxes assessed and paid up to April 3, 1926. Nevertheless, in the District Court's findings of fact, it made this specific finding:

"1. That payment of the excise taxes in suit was made under duress and after protest by the plaintiff against its collection."

8. The plaintiff made and filed its corporate income tax returns for the calendar years 1922 to 1926, inclusive, showing a tax due thereon, which was duly assessed on such returns by the Commissioner of Internal Revenue, and on said returns of income so filed, plaintiff claimed, took, and the Commissioner of Internal Revenue allowed, deductions covering the amounts of manufacturer's excise taxes paid during the period from 1922 to 1926, inclusive, which reduced the amounts of income tax due from plaintiff for such period, and resulted in a benefit to plaintiff for each of such years as follows:

Period	Excise tax paid	Rate	Income tax deduction	Interest June 5, 1944	Total
1922	$286,769.89	12½	$35,846.24	$45,644.21	$81,490.45
1923	330,696.97	12½	41,337.12	50,155.71	91,492.83
1924	253,007.75	12½	31,625.97	36,475.29	68,101.26
1925	192,677.83	13	25,048.12	27,385.94	52,434.06
1926	43,047.28	13½	5,811.38	6,005.09	11,816.47
Total			139,668.83	165,666.24	305,335.07

55 9. On July 19, 1926, the plaintiff filed with the Collector of Internal Revenue for the First District of Pennsylvania a claim for refund of the said manufacturers' excise taxes collected from the plaintiff from July 31, 1922, to April 3, 1926, in the amount of $825,151.52, a copy of which claim for refund is attached to the Complaint filed in this case, marked Exhibit "D", and by reference made a part hereof, which said claim for refund was rejected by the Commissioner of Internal Revenue on January 7, 1927.

10. A suit for the collection of the excise taxes exacted from the plaintiff during the period from July 31, 1922, to April 3, 1926, for batteries sold from June, 1922, to February, 1926, was filed against the then Collector of Internal Revenue on June 28, 1928, being No. 14,008 of June Term, 1928, at law, in the United States District Court for the Eastern District of Pennsylvania. After proceedings, on October 13, 1931, the District Court made the following entry:

"Before KIRKPATRICK, J.

"And now, to wit, October 13, 1931, judgment is entered in favor of the plaintiff, The Electric Storage Battery Company and against the defendant, Blakely D. McCaughn, formerly Collector of Internal Revenue of the United States for the First District of Pennsylvania, in accordance with the Findings of Fact and Conclusions of Law by Kirkpatrick, J. filed on April 28, 1931 for the following:

56 "1. *Amount of taxes paid on the following respective dates with interest thereon from the respective dates of payment, to wit:*

"Date of payment of tax	Amount of tax paid	Interest from date of payment to November 12, 1930
July 29, 1922	$20,750.15	$10,319.08
Aug. 31, 1922	20,964.09	10,313.76
Sept. 30, 1922	25,252.34	12,302.07
Oct. 30, 1922	28,855.64	13,912.37
Nov. 29, 1922	30,681.87	14,639.46
Dec. 30, 1922	27,588.65	13,025.62
Jan. 31, 1923	27,138.68	12,671.60
Feb. 28, 1923	23,111.96	10,676.91
Mar. 31, 1923	19,309.31	8,823.83
Apr. 30, 1923	27,260.50	12,366.20
May 31, 1923	30,663.24	13,705.63
June 30, 1923	24,745.81	10,936.97
July 31, 1923	21,297.78	9,306.55
Aug. 31, 1923	22,377.41	9,656.43
Sep. 30, 1923	30,219.85	12,903.05
Oct. 31, 1923	33,921.42	14,313.91
Dec. 1, 1923	37,907.72	15,800.25
Dec. 31, 1923	32,646.71	13,449.55
Jan. 31, 1924	25,405.06	10,339.16
Feb. 29, 1924	29,394.76	11,815.89
Mar. 31, 1924	24,512.81	9,730.91
Apr. 30, 1924	28,399.85	11,131.96
June 2, 1924	29,246.94	11,308.15
June 30, 1924	20,858.35	7,907.32
July 31, 1924	18,777.06	7,078.4[illegible]
Sep. 2, 1924	11,938.24	4,436.77
Sep. 30, 1924	13,044.63	4,787.02
Oct. 31, 1924	16,898.57	6,116.82
Dec. 1, 1924	18,212.35	6,498.32
Dec. 31, 1924	16,319.13	5,743.89
Jan. 31, 1925	19,704.88	6,837.05
Feb. 28, 1925	15,464.49	5,286.43
Mar. 31, 1925	11,781.17	3,959.82
May 1, 1925	13,435.65	4,455.06
June 2, 1925	10,969.77	3,593.01
June 30, 1925	11,818.74	3,805.31
Aug. 1, 1925	11,528.05	3,662.18
Sept. 1, 1925	15,518.83	4,870.08
Sept. 30, 1925	15,367.67	4,717.45
Nov. 2, 1925	19,885.01	5,998.19
Nov. 30, 1925	25,838.09	7,673.36
Dec. 31, 1925	21,264.97	6,208.79
Feb. 1, 1926	18,877.46	5,414.21
Mar. 1, 1926	14,892.72	4,196.89
Apr. 1, 1926	9,277.10	2,567.98
Total	973,532.57	389,328.70
Grand total		1,362,861.27

57 "2. and interest on $973,532.57, being the total amount of taxes paid, from November 12, 1930 to April 28, 1931 ..... $26,934.40

"3. and interest on $973,532.57, being the total amount of taxes paid, from April 28, 1931 to October 13, 1931 ..... 26,772.14

Total amount of taxes paid and interest from the respective dates of payment to October 13, 1931 ..... 1,416,567.81

"4. and interest upon the total amount of taxes paid, $973,532.57, from October 13, 1931, according to law.

By the Court.

Attest:

(Sgd.) GEORGE BRODBECK,
Clerk."

Upon appeal by the defendant, the Circuit Court of Appeals entered a mandate affirming the aforesaid action of the District Court.

11. On May 11, 1933, the plaintiff filed with the then Commissioner of Internal Revenue a judgment claim on Treasury Department Form 843, in which it demanded to be refunded $1,416,567.81, together with interest thereon from October 13, 1931, the principal sum being the amount described in paragraph 10 of this stipulation. The Commissioner of Internal Revenue refused to allow said judgment claim for the alleged reason that, in his opinion, the provisions of Section 424 of the Revenue Act of 1928 had not been complied with by the plaintiff in its proceedings before the United States District Court, in that plaintiff had failed to offer evidence and to prove what amount, if any, of the taxes collected from the plaintiff had been passed on to its customers, and that in
58 view of the decision of the United States Supreme Court in case of *Williard Storage Battery Company* vs. *Routzahn*, 291 U. S. 645, 78 L. Ed. 859 (1934), the District Court's alleged judgment of $1,416,567.81 and the Circuit Court of Appeal's mandate affirming the District Court were both void. Pursuant to an offer of settlement under date of October 16, 1934, to the Commissioner of Internal Revenue to exclude the principal sum of $148,381.05, representing the amount of excise taxes passed on to plaintiff's vendees, the Commissioner of Internal Revenue, after having satisfied himself after an investigation by an Internal Revenue Agent that the sum of $148,381.05 represented the amount of excise taxes which plaintiff had passed on to its customers, with the approval of the Attorney General of the United States, accepted said offer of settlement, and authorized the disbursing clerk of the Treasury Department on September 25, 1935, to refund to the plaintiff the sum of $1,395,515.35, of which amount $570,363.83 represented interest, the balance representing excise taxes in the amount of $825,151.52 which had not been passed on. A certified copy of the Commissioner's Schedule of Refunds, Treasury Department Form 7809, dated September 25, 1935, authorizing this refund, is attached hereto, made part hereof, and marked Exhibit 4. Thereafter, under date of October 15, 1935, the Treasury Department issued its check to the plaintiff for the sum of $1,395,515.35, representing a refund of the aforesaid excise taxes and interest thereon.

12. Of the said sum of $1,395,515.35 paid by the
59 United States to the plaintiff, only the sum of $36,351.88 was included by the plaintiff in its return of income and excess profits taxes for the year 1935, as representing what plaintiff regarded as interest accrued from January 1, 1935, to October 15, 1935.

13. On or about November 22, 1938, the plaintiff received notice and demand from the defendant for payment of additional income and excess profits taxes for the yea 1935, upon the ground that there should have been included in the plaintiff's return of income for that year, in addition to the amount of $36,351.88, the amount of the said refund of excise taxes in the principal sum of $825,151.52, and the remaining interest thereon amounting to $534,011.95, as recommended by a Revenue Agent's report dated January 7, 1937.

14. The notice and demand for the payment of additional income and excess profits taxes was based upon the following computation of such additional taxes for the year 1935, which included in the plaintiff's income the said refunds of excise taxes and interest thereon:

Additional income tax claimed for the year 1935	$188,140.56
Interest on above amount to November 18, 1938	30,195.27
Additional excess profits tax claimed for the year 1935	9,883.31
Interest on above to November 18, 1938	1,586.20
Total	229,805.34

60 15. On or about December 5, 1938, the plaintiff paid to the defendant the said income and excess profits taxes and interest in the total amount of $229,805.34 under protest, and with notice that refund thereof would be claimed.

16. On or about November 30, 1940, th plaintiff filed with the defendant, as Collector of Internal Reven e of the United States for the First District of Pennsylvania, a claim for refund in the amount of $229,805.34, a certified copy of which said claim for refund is attached hereunto, made part hereof, and marked Exhibit 5A.

17. The said claim for refund in the amount of $229,805.34 was disallowed in full by the Commissioner of Internal Revenue by registered letter dated July 25, 1941, a true copy of which letter is attached to the Complaint filed in this suit, a certified copy of which is attached hereunto, made part hereof, and marked Exhibit 5B.

18. In the taxable year of 1935, plaintiff reported as taxable income for that year, credited to surplus on its books, a refund of $769.78, representing Massachusetts excise taxes which previously had been charged to expenses in a prior taxable year and allowed as a deduction in such year.

19. Plaintiff incurred legal fees and expenses aggregating $48,622.46 in years prior to the taxable year 1935 in connection with the litigation for the refund of the aforesaid excise taxes.

61 The items making up the total of $48,622.46 were carried on plaintiff's books in a suspense account until the litigation was finally settled in 1935, and then the total amount was charged

to surplus on the taxpayer's books, as an offset against the sum of $1,395,515.35 received in that year as a refund of excise taxes paid for the period from June 1, 1922, to February 28, 1926, in the amount of $825,151.52, plus interest thereon in the amount of $570,363.83, of which total amount the sum of $1,359,163.47 was credited to surplus for the reason that plaintiff regarded these items as properly referable to the prior years 1922 to 1926, inclusive; and the difference of $36,351.88 was credited to profit and loss as interest applicable to the year 1935. The items making up the total $48,622.46 were taken as income deductions for 1935, which deductions the Commissioner of Internal Revenue allowed.

20. Plaintiff paid to its managers and other employees in the year 1935 bonuses aggregating $33,006.00, based on four per cent. (4%) of the principal amount of $825,151.52 received in that year as a refund of excise taxes, which sum of $33,006.00 was allowed to plaintiff as a deduction in computing its net taxable income for the year 1935. This bonus payment was based on a practice which was in existence during the period 1922 to 1926 inclusive, whereby the plaintiff paid its managers and certain other employees a bonus of four per cent. (4%) on the plaintiff's net operating profit realized from the sale of the plaintiff's products. The adjust-
62 ment made in 1935 represented the underpayment of bonus during the years 1922 to 1926 inclusive, because of the deduction from operating profits in those years of the amounts of excise taxes paid aggregating the said sum of $825,151.52.

21. Of the aforesaid $148,381.05 which represented excise taxes which were passed on to purchasers of the plaintiff's storage batteries and not refunded to plaintiff as aforesaid, there was included the sum of $11,703.50, which represented excise taxes upon the sales of storage batteries to Railway Express Company which were passed on to the said purchaser. In the year 1935 the plaintiff voluntarily paid to the said Railway Express Company the said sum of $11,703.50, which was allowed by the Commissioner of Internal Revenue as a deduction from the plaintiff's taxable income for the year 1935.

22. In each month during the period beginning March 1, 1919, and ending May 31, 1922, the plaintiff made sales of electric storage batteries, and made monthly returns of excise taxes thereon and paid taxes thereon amounting to $1,008,676.63, in accordance with the provisions of Section 900 of the Revenue Act of 1918 and Section 900 of the Revenue Act of 1921.

23. The payments of the excise taxes in question between April 28, 1919, and June 27, 1922, were made to the then Collectors
63 of Internal Revenue for said First District of Pennsylvania, who were predecessors of the defendant herein.

24. The said excise taxes amounting to the sum of $1,008,076.63 were paid between April 28, 1919, and June 27, 1922, by the plaintiff upon demand of the then Collector of Internal Revenue. Under date of April 28, 1919, the plaintiff herein addressed a letter to the then Collector of Internal Revenue at Philadelphia, Pennsylvania, in which it protested the payment of excise tax for the period from February 25 to March 31, 1919, both inclusive. A true copy of said letter of April 28, 1919, is attached hereto and made a part hereof, as Exhibit 3. In the oral testimony of Mr. Augustus Stoughton in the case of the plaintiff vs. McCaughn, in the United States District Court for the Eastern District of Pennsylvania, June Term, 1928, he testified that he proceeded to Washington, D. C., and conferred with the then Commissioner of Internal Revenue concerning the payment of excise taxes assessed against the plaintiff herein, described in the letter of April 28, 1919, and protested to the Commissioner against the assessment and collection thereof; and upon return to Philadelphia, advised the taxpayer to pay the tax and to say that it was paid under intention to avoid penalties, and to make a return therefor, and that was done. Further than that, the record of the evidence and documentary proof in the excise tax hearing fails to dis-
64 close any further protest made from time to time with respect to the assessments and payments of excise taxes by this plaintiff for subsequent periods up to and including the excise taxes assessed and paid up to April 3, 1926. Nevertheless, in the District Court's findings of fact, it made this specific finding:

"1. That payment of the excise taxes in suit was made under duress and after protest by the plaintiff against its collection."

25. Of the gross excise taxes amounting to $1,008,076.63 paid between April 28, 1919, and June 27, 1922, the sum of $95,098.06 represented excise taxes paid upon the sale of component parts of the said electric storage batteries, and was refunded by the United States to the plaintiff.

26. The net amount of the excise taxes in the sum of $912,978.57 paid between April 28, 1919, and June 27, 1922, was deducted from the income on the plaintiff's income tax returns for the years 1919 to 1922, inclusive.

27. The excise taxes paid by the plaintiff between April 28, 1919, and June 27, 1922, were in the amounts and at the times set forth in the statement thereof hereunto attached and marked Exhibit 6, upon which statement also is set forth the amounts of excise taxes which were refunded by the United States to the plaintiff.

65 28. No claim for refund of the said excise taxes paid between March 1, 1919, and May 31, 1922, was made by the

plaintiff and no suit was instituted for the recovery of said excise taxes, for the reason that on July 19, 1926, the filing of a claim for refund and a suit for the recovery of said excise taxes were then barred by the Statute of Limitations.

29. On or about November 3, 1938, the plaintiff executed and delivered to the Commissioner of Internal Revenue Waiver of Restrictions on Assessment and Collection of Deficiency in Tax, Form 870, as to the balance of deficiency of income and excess profits taxes for the year 1935, in the sum of $229,805.34; and in the said Waiver the plaintiff stated: "The execution of this Waiver is not an admission of liability for deficiency in tax and if the amount of the alleged deficiency is paid refund thereof will be claimed".

66 30. The reduction of plaintiff's income and excess profits taxes effected for the years 1919 to 1922, inclusive, as a result of the deductions of the said excise taxes paid during each of said years, respectively, amounts to the sum of $178,691.52, with interest thereon to June 5, 1944, amounting to $244,709.51.

31. The additional income and excess profits taxes amounting to the sum of $229,805.34 paid to the defendant on December 3, 1938, and for the recovery of which this suit is instituted, and all of the excise taxes paid by the plaintiff, upon the sale of electric storage batteries, between April 28, 1919, and April 3, 1926, to the Collectors of Internal Revenue for the First District of Pennsylvania then holding office at the time of such payments, respectively, were paid by the defendant and by the said Collectors of Internal Revenue, respectively, to the Treasurer of the United States, in accordance with the Statutes of the United States providing for and directing such payments.

Philadelphia, Pa., June 5, 1944.

(Sgd.) Charles C. Norris, Jr.,
CHARLES C. NORRIS, JR.,
Attorney for the Plaintiff,
1500 Walnut Street, Philadelphia, Pennsylvania.

(Sgd.) GERALD A. GLEESON,
United States Attorney.

(Sgd.) THOMAS J. CURTIN,
Assistant United States Attorney.

(Sgd.) LELAND T. ATHERTON,
Special Assistant to the Attorney General.

87 In United States District Court

Plaintiff's requests for findings of fact and conclusions of law

Filed Aug. 2, 1944

The Plaintiff, by its attorneys, Charles C. Norris, Jr., John Ross, and William P. Cairo, respectfully requests the Court to make the following findings of fact and conclusions of law, to wit:

FINDINGS OF FACT

1. The plaintiff, The Electric Storage Battery Company, was organized under the laws of the State of New Jersey and had its principal office in Philadelphia, County of Philadelphia, Commonwealth of Pennsylvania, and is and was engaged in the business of manufacturing and selling electric storage batteries. (Stip. pars. 1 and 3, R. 52 and 53.)

2. The defendant is the United States Collector of Internal Revenue for the First District of Pennsylvania, and a resident and a citizen of the Eastern District of Pennsylvania, and was acting in such capacity during 1935 at the time of the collection of the sum of $229,805.34 herein mentioned. (Stip. par. 2, R. 52.)

88 3. In each month during the period beginning June 1, 1922, and ending February 28, 1926, the plaintiff made sales of electric storage batteries, and made monthly returns early in the following month of manufacturers' excise taxes thereon and paid as taxes on sales thereof during such period $825,151.52 as required by the then Collector of Internal Revenue for the First District of Pennsylvania as the Collector and the Commissioner required under the provisions of Section 900 of the Revenue Act of 1921 and Section 600 of the Revenue Act of 1924. All of such sales were made to persons other than manufacturers of automobile trucks, automobile wagons, automobiles or motorcycles. (Stip. par. 5, R. 53 and 54.)

4. The plaintiff kept its books and records on the accrual calendar basis from 1919 to 1935, inclusive (P. Exs. 14 & 15 and R. 29 & 30); and prepared and filed its income tax returns during that period on the same basis. (P. Exs. 14 & 15, R. 235 and 238.)

5. Each of the plaintiff's income tax and excess profits tax returns for the years 1919 to 1935, inclusive, was examined and audited by the representatives of the Bureau of Internal Revenue. (Stip. par. 5, R. 53.)

6. The payment of excise taxes in the sum of $825,151.52 between July 31, 1922, and April 3, 1926, was made by plaintiff, under protest to avoid penalties, upon demand of the then Collector of Inter-

nal Revenue (Stip. pars. 6 and 7, R. 53), and such sums were in turn paid by the then Collector of Internal Revenue for the First District of Pennsylvania to the Treasurer of the United States pursuant to R. S. 3210, amended as Sec. 1031 (b) Revenue Act of 1924—43 Stat. 351—26 U. S. C. A. Int. Rev. Acts p. 139.

89 (Stip. par. 31, R. 71 and 72.) 7. In the plaintiff's corporate income tax returns for the years 1922 to 1926, inclusive, the plaintiff, after making payment of such excise taxes under protest to avoid penalties, claimed, and the Commissioner of Internal Revenue allowed, as deductions such excise taxes paid, which deductions resulted in a reduction of the amount of income tax due from the plaintiff for such period, exclusive of interest, of the sum of $139,668.83. This sum, when added to interest computed at at the rate of 6% to June 5, 1944, made a total of $305,335.07 and resulted in a benefit of that sum to the plaintiff. (Stip. Par. 8, R. 56.) Likewise, the plaintiff benefited by the deduction from its taxed income in 1919, 1920, 1921, and 1922 of $534,205.04 excise taxes paid during the 1919–1922 period, with interest computed to June 5, 1944, to the extent of $423,401.03. (Stip. par. 31, R. 71.)

8. On July 19, 1926, the plaintiff filed with the Collector of Internal Revenue for the first District of Pennsylvania a claim for refund of said manufacturers' excise taxes collected from the plaintiff during the period from July 31, 1922, to April 3, 1926, in the amount of $825,151.52, and such claim for refund was rejected by the Commissioner of Internal Revenue on January 7, 1927. (Stip. par. 9, R. 57 and Ex. D to Comp.)

9. A suit for the collection of the excise taxes exacted from plaintiff during the period from July 31, 1922, to April 3, 1926, was filed against the then Collector of Internal Revenue on June 28, 1928, being No. 14,908 on the June 1928 calendar at law in United States Court for the Eastern District of Pennsylvania. After trial and due proceedings on October 13, 1931, this court entered judgment in favor of the taxpayer therein (the plaintiff herein) for the sum of $1,416,567.81, and the mandate of the Circuit Court of Ap-

90 peals for the Third Circuit was entered affirming the decision of this court. (Stip. par. 10, R. 57.)

10. After negotiations between the representatives of the plaintiff and the Government the plaintiff agreed to accept and the Government to pay $1,395,515.35, representing the refund of illegally exacted excise taxes which had been absorbed by plaintiff, with interest thereon, and a check for this sum was issued to plaintiff on October 15, 1935. (Stip. par. 11, R. 62.)

11. Of the total sum of $1,395,515.35 paid by the United States to the plaintiff on October 15, 1935, $825,151.52 of this sum represented principal and the remainder thereof in the sum of $570,363.83 represented interest. Of the latter sum, $36,351.88

represented the amount of interest paid and accruable from January 1 to Octobre 15, 1935, and was included as a part of plaintiff's gross income for that year. (Stip. pars. 12 and 13, R. 63.)

12. On examination of the plaintiff's books and records the agents of the Commissioner of Internal Revenue included all of the refund of principal and interest received by plaintiff on October 15, 1935, except the sum of $36,351.88 reported by plaintiff as a part of this gross income during that year and as a result thereof notice and demand for the payment of additional income and excess profits taxes for 1935, with interest thereon, in the total sum of $229,805.34 was demanded from plaintiff. (Stip. pars. 13 and 14, R. 63 and 64.)

13. On or about December 5, 1938, the plaintiff paid to the defendant herein the said income and excess profits taxes, with interest thereon, in the total sum of $229,805.34 under protest with notice to the Commissioner of Internal Revenue and the Collector of Internal Revenue of the First District of Pennsylvania,
91 that refund thereof would be claimed. (Stip. par. 15, R. 64.)

14. On November 30, 1940, the plaintiff filed with the defendant herein as Collector of Internal Revenue of the United States for the First District of Pennsylvania a claim for refund in the amount of $229,805.34. (Stip. par. 16, R. 64, and Ex. 5A to Stip.)

15. The said claim for refund in the amount of $229,805.34 was disallowed in full by the Commissioner of Internal Revenue on July 25, 1941. (Stip. par. 17, R. 65, and Ex. 5B to Stip.)

16. In each month during the period beginning March 1, 1919, and ending May 31, 1922, the plaintiff made sales of electric storage batteries and made monthly returns of excise taxes thereon and paid such taxes amounting to $1,008,076.63, to the then Collectors of Internal Revenue for the First District of Pennsylvania upon demand of such Collectors under their interpretation of the provisions of Sections 900 of the Revenue Acts of 1918 and 1921. (Stip. pars. 22 and 23, R. 67 and 68.)

17. The payments of said excise taxes in the sum of $1,008,076.63 were made under duress and after protest by plaintiff against its collection. (Stip. par. 24, R. 68.)

18. Of the gross excise taxes in the sum of $1,008,076.63 paid between April 28, 1919, and June 27, 1922, the sum of $95,098.06 represented excise taxes paid upon the sale of component parts of electric storage batteries and was refunded by the United States to the plaintiff. (Stip. par. 25, R. 70.)

19. The net amount of excise taxes in the sum of $912,978.57 paid between April 28, 1919, and June 27, 1922, was deducted from
92 the income of the plaintiff's income tax returns for the years 1919 and 1922 inclusive. (Stip. par. 26, R. 70.)

20. Of the sum of $912,978.57 paid as excise taxes by the plaintiff between April 28, 1919, and June 27, 1922, the net sum of $534,205.04 was absorbed by the plaintiff (R. 38—P. Ex. 16, R. 239) and the remaining amount of such excise taxes paid by plaintiff was passed on to the purchasers of said batteries. (R. 38—P. Ex. 16, R. 239.)

21. The plaintiff did not increase the price of its electric storage batteries at the time of the advent of the imposition tax on February 25, 1919, nor was any increase thereon made until approximately one year after the imposition of such tax. (Sec. 900, Rev. Act 1918, R. 38 and 39.)

22. The subsequent increase in plaintiff's price of storage batteries was not due to the imposition of the excise tax in question under Section 900 of the Revenue Act of 1918, but was due to the increase in cost of lead, antimony, and other products used in the manufacture of electric storage batteries. (R. 38 & 39—P. Exs. 17 & 18, R. 240–242.)

23. The electric storage batteries manufactured and sold by the plaintiff upon which excise taxes were paid between April 28, 1919, and June 27, 1922, were the same type of batteries manufactured and sold by plaintiff upon which excise taxes were paid during the period from July 31, 1922, to April 3, 1926, and were not primarily adaptable only to automobiles but were equally adaptable to use in stationary engines and marine engines, and for other purposes where the duty requirement was the same and were used interchangeably for that purpose. (R. 20–27—P. Exs. 1–13, R. 103–105, 166–167, 182–183, 202–203, 221–231.)

93 24. The $229,805.34 additional income and excess profits taxes for 1935 paid by plaintiff to defendant, and the $912,978.57 net amount of excise taxes, which includes the net sum of $534,205.04 thereof absorbed by plaintiff, paid by plaintiff between April 28, 1919, and June 27, 1922, to the then Collectors of Internal Revenue, predecessors of defendant, were in turn paid by defendant and by the said Collectors, respectively, to the Treasurer of the United States, pursuant to R. S. 3210, amended as Sec. 1031 (b) of the Revenue Act of 1924, 43 Stat. 351, 26 U. S. C. A. Int. Rev. Acts p. 139. (Stip. par. 31, R. 71 and 72.)

94 CONCLUSIONS OF LAW

1. The refund of $825,151.52 of excise taxes illegally collected, paid to plaintiff on October 15, 1935, was not income subject to Federal Income Tax for 1935 or any other year.

2. The refund of $570,363.83 interest on illegally collected excise taxes, paid to plaintiff on October 15, 1935 was not income subject to Federal Income Tax for 1935 or any other year.

3. The refund of $825,151.52 of excise taxes illegally collected in the years 1922, 1923, 1924, 1925, and 1926, paid to plaintiff on October 15, 1935, is allocable to and among the years 1922, 1923, 1924, 1925, and 1926.

4. The refund of $534,011.95 of interest for the period from July 31, 1922 to December 31, 1935, inclusive, upon the refunded $825,151.52 excise taxes illegally collected, paid to plaintiff on October 15, 1935, was not income to plaintiff subject to income tax for the year 1935.

5. The payment by plaintiff of the $534,205.04 excise taxes during the period from April 28, 1919, to June 27, 1922 made under duress and protest, and the deficiency assessment against plaintiff of the additional 1935 income and excess profits taxes and interest in the sum of $229,805.34, were part of the same transaction and had their origin in the erroneous application of Sections 900 of the Revenue Acts of 1918 and 1921.

6. The plaintiff is entitled to recoup, against the claimed $305,641.10 additional 1935 Federal income and excess
95 profits taxes and interest thereon to June 5, 1944, the $1,275,-368.63 aggregate 1919–1922 excise taxes and interest thereon to June 5, 1944, less the $728,736.10 aggregate additional income and excess profits taxes for the years 1919–1926 and interest thereon to June 5, 1944 to which the Federal Government is equitably entitled.

7. The plaintiff is entitled to judgment against the defendant in the amount of $229,805.34, together with interest thereon at the rate of six per centum per annum from December 5, 1938, to the date hereof.

Respectfully submitted.

(S) CHARLES C. NORRIS, JR.,
(S) JOHN ROSS,
(S) WILLIAM P. CAIRO,
Attorneys for plaintiff.

96 In United States District Court

[Title omitted]

Defendant's requests for findings of fact and conclusions of law

Filed Aug. 9, 1944

The above-entitled cause on June 5, 1944, duly and regularly came on for trial herein before this Court sitting without a jury. Having considered the testimony of the witnesses, the stipulated facts, the documentary evidence, and briefs of counsel, the Court makes and publishes the following:

FINDINGS OF FACT

1. The facts as to the return, assessment, payment, and claim for refund of the income and excess profits tax for the calendar year 1935, are as set forth in defendant's answer, paragraphs 10, 11, 12, 13, and 23.

2. All the facts contained in that certain "Agreed Statement of Facts", made on June 5, 1944, and duly executed by counsel for the parties herein; and it is true that an exact copy of the claim for refund filed by plaintiff on the 30th day of November, 1940, is attached to said "Agreed Statement of Facts", and is marked Exhibit 5A.

3. It is true that an exact copy of the claim for refund filed
97 by plaintiff on the 19th day of July, 1926, is attached to said "Agreed Statement of Facts" and is marked Exhibit D.

4. It is true that an exact copy of the Schedule of Refunds, Treasury Department Form 7809, which was signed by the Commissioner of Internal Revenue on September 25, 1935, authorizing the refund of $1,395,515.35, of which amount $570,363.83 was interest, and the balance of $825,151.52 was excise taxes illegally collected from plaintiff for the period from June 1, 1922, to February 28, 1926, is attached to said "Agreed Statement of Facts", and is marked Exhibit 4.

5. The plaintiff obtained a tax benefit of $17,510.99, exclusive of interest, in the taxable year 1935 on account of having claimed certain deductions in computing its taxable income for that year which were allowed by the Commissioner of Internal Revenue. The interest on the principal amount of $17,510.99 computed to June 5, 1944, is $8,638.17; and the entire benefit including interest to June 5, 1944, is $26,149.16. The deductions which resulted in this tax benefit were the following:

(a) $48,622.46 representing the sum of the legal fees and expenses incurred in years prior to 1935 in connection with litigation for the refund of the excise taxes amounting to $825,151.52 which were refunded to it in 1935;

(b) $33,006 representing the amount of bonuses paid in 1935 to its managers and other employees based on 4% of the principal amount of $825,151.52 received in that year as a refund of excise taxes. This bonus payment was based on a practice which was in existence during the period 1922 to 1926, inclusive, whereby the plaintiff paid its managers and certain other employees a bonus of 4% on its net operating profit realized from the sale of its products. The adjustment made in 1935 represented the
98 underpayment of bonus during the years 1922 to 1926, inclusive, because of the deduction from operating profits in those years of the amounts of excise taxes paid aggregating the sum of $825,151.52;

(c) $11,703.50 paid in the year 1935 to the Railway Express Company constituting excise taxes upon the sales of storage batteries to that company by the plaintiff which were passed on to that customer. This sum was included in the amount of $148,381.05 which represented excise taxes that had been passed on to the purchasers of the plaintiff's storage batteries and not refunded to it.

6. The plaintiff reported as taxable income in its federal income and excess profits tax return for 1935 a refund of $769.78, which had been credited to surplus on its books, representing Massachusetts excise taxes which previously had been charged to expenses in a prior taxable year and allowed as a deduction in such year.

7. The plaintiff obtained a tax benefit of $178,691.49, exclusive of interest, as the result of having claimed as deductions in its federal income tax returns for the years 1919 to 1922, inclusive, excise taxes amounting in the aggregate to $912,978.57, which were collected from it during the period from February [illegible], 1919, to June 30, 1922. The interest on the principal amount of $178,691.49, computed to June 5, 1944, is $244,70[illegible], and the entire benefit including interest to June 5, 1944, is $423,[illegible].

8. The plaintiff obtained a tax benefit of $139,668.83, exclusive of interest, as the result of having claimed as deductions in its federal income tax returns for the years 1922 to 1926, inclusive, excise taxes amounting in the aggregate to $825,151.52, which were collected from it during the period from July 1, 1922, to April 3, 1926, and subsequently refunded to it in 1935. The interest on the principal amount of $139,668.83 computed to June 5, 1944, is $165,666.24, and the entire benefit including interest to June 5, 1944, is $305,335.07.

9. The plaintiff's books of account were not kept on the strict accrual basis of accounting but were kept in accordance with a hybrid method of accounting in which the manufacturer's excise taxes assessed for the period from February 25, 1919, to April 3, 1926, were deducted in the years paid instead of being deducted in the years when the liability therefor was incurred or had accrued; and its income tax returns were made on the cash receipts and disbursements basis.

10. Plaintiff's income and excess profits tax for the calendar year 1935 was not overpaid.

From the above facts the Court concludes as a matter of law:

CONCLUSIONS OF LAW

1. The Commissioner of Internal Revenue properly included in the plaintiff's taxable income for the year 1935 the sum of $1,359,163.47, representing federal manufacturer's excise taxes in the

amount of $825,151.52 illegally collected from it during the period from July 31, 1922, to February 3, 1926, inclusive, which was refunded to plaintiff in the year 1935, and interest thereon in the amount of $570,363.83, which was refunded to it in that year.

2. The plaintiff is not entitled to set off or recoup any amount paid by it as federal manufacturer's excise taxes on the sale of electric storage batteries during the period from Febru-
100 ary 25, 1919, to June 30, 1922, which were assessed against it during that period.

3. The plaintiff is not entitled to any recovery in this action; the motion of the defendant for a judgment is sustained and judgment should be in his favor, with costs to be entered by the Clerk in due course.

It is so ordered:

_____,

District Judge.

101 In the District Court of the United States for the Eastern District of Pennsylvania

Civil Action No. 3299

THE ELECTRIC STORAGE BATTERY COMPANY, A CORPORATION

WALTER J. ROTHENSIES, INDIVIDUALLY AND AS UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

Opinion

Filed Oct. 30, 1944

SUR PLEADINGS AND PROOF

Before (s) KIRKPATRICK, J.

This is a suit to recover income and excess profits taxes and interest in the sum of $229,805.34, assessed for the year 1935 and paid by the plaintiff under protest. The case was tried to the court without a jury, most, if not all, of the material facts being covered by a stipulation.

The taxpayer (keeping its books and making its returns upon the accrual basis) took deductions in its income tax returns for the years 1922 to 1926, inclusive, amounting in the aggregate to $825,151.52, representing manufacturer's excise taxes which had been assessed against it during those years upon the erroneous theory that the storage batteries which it manufactured were parts of automobiles within the meaning of the Revenue Acts. The

excise taxes were paid under protest to avoid penalties, upon demand of the then Collectors of Internal Revenue. The
102 deductions were allowed by the Commissioner and resulted in saving the plaintiff a total of $139,668.83 of income tax for the years in question.

In July 1926 the plaintiff filed a claim for refund of the excise taxes, which was rejected, and the plaintiff then brought suit and finally, on May 1, 1933, after an appeal to the Circuit Court of Appeals and denial of certiorari, obtained a judgment for $1,416,567.81, being the amount of excise taxes, with interest. After lengthy negotiations, the government, on October 15, 1935, paid the plaintiff $1,395,515.35, which sum the plaintiff accepted in full satisfaction of the judgment.

The Commissioner added the bulk of this sum [1] to the income returned by the plaintiff for 1935, and as a result assessed additional income and excess profits taxes amounting, with interest, to $229,805.34. This the plaintiff is seeking to recover in this suit.

An additional fact is that for the years 1919 to 1922, inclusive, the plaintiff paid, under protest, a total of $534,205.04 [2] as excise taxes upon the sale of its storage batteries—an amount not included in the claim for refund filed by it in 1926, because then barred by the statute of limitations.

The plaintiff bases its case upon alternative theories,
103 first, that the payment to it in 1935 was not income at all, but the restoration of a part of its capital which had been taken when the government, illegally, compelled it to pay the excise taxes in the years 1922 to 1926. Second, that, if income, it was properly accruable not for 1935 but for the years 1922 to 1926, and, consequently, the statute of limitations prevents assessment in 1935 of an additional tax in respect of it. Finally, the plaintiff contends that even if the assessment of the income tax in suit is held proper if is entitled to judgment by way of recoupment for the admittedly illegal excise taxes paid by it under protest between 1919 and 1922.

First. "The law is pretty well settled that * * * refunds of taxes erroneously and illegally collected constitute taxable income * * *". Universal Inc. v. Commissioner, 109 F. 2d 616. See also Nash v. Commissioner, 88 F. 2d 477 and Bimberg v. Helvering, 126 F. 2d 412. So far as I know, the rule of these cases has not been expressly rejected by any court decision.

The plaintiff contends that the payment of the excise taxes resulted in an impairment of its capital and that the exaction was in the nature of a trespass. The Board of Tax Appeals in a group

[1] All of it except the sum of $36,351.88 representing interest which the taxpayer admitted was earned from January 1, 1935, to September 15, 1935, and which it included in its report of its gross income for 1935.

[2] This was the amount of such taxes not passed on to the plaintiff's customers but absorbed by it.

of recently decided cases conceded as much but held that the subsequent refund was income, for the reason that "by the prior deduction of the amount of loss from taxable income the taxpayer has already had, for income tax purposes, a recoupment of the capital out of taxable income. Any further recovery is accordingly in
the nature of a replacement of taxable income and, being in
104 excess of the reduced cost of the capital asset, is equivalent
to gain to the taxpayer." Estate of James N. Collins v. Commissioner, 46 B. T. A. 765, 769; John V. Dobson v. Commissioner, 46 B. T. A. 770. See also Houbigant Inc. v. Commissioner, 31 B. T. A. 954. These cases held in effect that the money, upon its return, has lost its character as capital. This Court, in Philadelphia National Bank v. Rothensies, 43 F. Supp. 923 (a recovery of a bad debt case) took a somewhat different view and held that, although the money taken by the government remained capital even upon its return, the taxpayer, by claiming and receiving a benefit in respect of the loss in the form of a deduction in its income tax, had voluntarily consented that it be taxed as income in the event of its return, regardless of its nature. It does not matter which theory be accepted; whether the recovery be taxable as income or, by waiver or implied consent as capital, the result is the same.

Second. The refund being taxable income, the question is as to the year in which it is properly accruable. Judge Hand in Bimberg v. Helvering, supra, called attention to the distinction recognized by a number of decisions between situations in which the statute had run against assessment in the year of the illegal overcharge and those in which it had not. He said, "It has been several times held that the Commissioner may cancel a deduction taken in one year for a tax which the taxpayer has accrued or paid, when the tax has been refunded in a later year because it was unlawfully imposed. Inland Products Co. v. Blair, 4 Cir., 31 F. 2d 867; Leach v. Commissioner, 1 Cir. 50 F. 2d 371; Bergan v.
Commissioner, 2 Cir., 80 F. 2d 89 * * * On the other
105 hand, in several cases when the time has passed to assess a
deficiency for the earlier year, courts have allowed the Commissioner to surcharge the income for the year of the refund. Houbigant, Inc. v. Commissioner, 2 Cir., 80 F. 2d 1012; Nash v. Commissioner, 7 Cir. 88 F. 2d 447; Union Trust Co. v. Commissioner, 7 Cir., 111 F. 2d 60." In Bohemian Breweries v. U. S., 27 F. Supp. 588, 592, the Court of Claims referred to, as established, "the rule that an amount deducted and allowed from income in a certain year must be included in income when collected or recovered in a subsequent year when the correction of the return and the tax liability in a prior year is barred by the statute of limitations." Bimberg v. Helvering, supra, was a case in which,

although the statute had not run, the Commissioner's determination that the refund was income for the year in which it was received was sustained, mainly because the taxpayer itself had accrued it for that year by returning part of it, but the opinion goes beyond the facts and expressly approves the rule of the Houbigant case to the effect that if the statute has run the refund may be assessed against the taxpayer in the year in which it was received.

106 Although, in this case, the plaintiff's accounting was at all times upon an accrual basis,[3] that does not mean that
107 the plaintiff may attribute an item of income to any year it pleases or that its determination of the year is final and conclusive. The question still remains whether the income is properly and legally accruable in the year to which the taxpayer has attributed it.

In each of the two recent cases of Dixie Pine Products Co. v. Commissioner, 320 U. S. 516, and Security Flour Mills Co. 1. Commissioner, 321 U. S. 281, the taxpayer was on an accrual basis. In the Dixie Pine case the taxpayer had been assessed for and had paid a manufacturer's gasoline tax to the state of Mississippi upon a product which it claimed was not gasoline and had brought suit in the state court to recover the payment. It accrued the liability on its books for the year in which it had paid the tax and claimed a corresponding deduction from its income tax for that year. The court said, "Here the taxpayer was strenuously contesting liability in the courts and, at the same time, deducting the amount of the tax, on the theory that the state's exaction constituted a fixed and certain liability. This it could not do. It must, in the circumstances, await the event of the state court litigation and might claim a deduction only for the taxable year in which its liability for the tax was finally adjudicated." In the Security Flour Mills case the taxpayer had not actually paid but had deposited, pendente lite, a processing tax the legality of which it was contesting. Meanwhile it had passed the tax on to its customers thereby assuming an obligation to reimburse them if the tax should be declared invalid. The tax was declared invalid, the impounded money was returned to the taxpayer and thereafter, in subsequent
108 years, refunds were made to the customers. In spite of the

[3] In the stipulation, filed in the suit for recovery of the excise taxes, there is a paragraph to the effect that the plaintiff "filed its corporation income-tax returns for the calendar years 1922 to 1926, inclusive, upon a cash receipts and disbursements basis * * *". I cannot agree with the defendant that this estops the plaintiff to prove, in this case, that the fact was otherwise. Not only was this part of the stipulation immaterial to the decision of that case, but I find that it was a pure oversight and inadvertently made by counsel. The stipulation contained a number of other matters of vital importance to the case, including a lot of figures which required careful checking. The trial was in progress when the stipulation was submitted and, except for the figures, was gone over rather hurriedly and the paragraph in question was obviously overlooked. Admissions of counsel inadvertently made will not be permitted to defeat a party's rights. Nesbitt, Assignee, Appellant, v. Turner, 155 Pa. 429. The paragraph in question will not be treated as an estoppel nor as res adjudicata in the present case.

fact that the taxpayer accrued the amount deposited as a liability for the year in which it was deposited, the court held that it was not entitled to a deduction for that year but must include in its income the total amount received from its customers in that year and take whatever deductions it was entitled to during the years in which refunds to the customers were made. The court said, "Since it denied liability for, and failed to pay, the tax during the taxable year 1935, it was not in a position in its tax accounting to treat the government's claim as an accrued liability. As it admittedly received the money in question in 1935 and could not deduct from gross income an accrued liability to offset it, the receipt, it would seem, must constitute income for that year."

In the Security Flour Mills case the court further said, "The uniform result has been denial both to Government and to taxpayer of the privilege of allocating income or outgo to a year other than the year of actual receipt or payment, or, applying the accrual basis, the year in which the right to receive, or the obligation to pay, has become final and definite in amount." The question in the present case therefore is, in what year had the plaintiff's right to receive a refund of the excise tax which it illegally paid, become "final and definite in amount"? Obviously, under the rule of the two cases just cited, not in the years 1922 to 1926, during which the tax was paid. It is also plain from those decisions that the fact that the exaction was subsequently determined to be illegal did not mean that there had been from the moment it was paid an immediate final and definite obligation to return it or a
109 correlative right to receive it—at least so far as allocating income or outgo in respect of it is concerned.

In its suit for the recovery of the excise taxes the plaintiff obtained judgment in 1933, but neither party in this case contends that the amount of the judgment is income for that year. Perhaps under ordinary circumstances it would be, but a special situation existed which, the defendant contends, and I think rightly, postponed the finality and definiteness of the taxpayer's right to receive and the government's obligation to pay the money until the year 1935 when all disputed questions were settled by agreement and payment was finally made.

In the suit to recover the excise taxes both this Court and the Circuit Court of Appeals had ruled that the plaintiff did not have to prove as a substantive element of its right to recover that it had not directly or indirectly passed on the tax to purchasers of its storage batteries, and the evidence did not show what part, if any, of the tax had been so collected from its customers. Subsequently in U. S. v. Jefferson Electric Co., 291 U. S. 386, the Supreme Court held that this view was wrong, disapproving of the decisions of this Court and the Circuit Court of Appeals in that respect by

specific reference to them. After this plaintiff's judgment was obtained the Commissioner contended that, under the rule of U. S. v. Jefferson Electric Co., supra, not only had it been rendered upon an erroneous theory but that the court was without jurisdiction, and declined to pay it. Negotiations followed in the course of which the plaintiff satisfied the Commissioner as to how much of the tax it had passed on to its customers, and agreed that that amount would be deducted from the judgment. This controversy was not settled until 1935, and then the judgment, so reduced, was paid.

I do not think it necessary to pass upon the defendant's present contention that the judgment was merely what it calls, a "purported" judgment—no judgment at all, not a final or binding adjudication. The fact remains that, after its rendition, the Commissioner still contested, in good faith, the plaintiff's right to recover the full amount of the judgment and the plaintiff, for purposes of settlement and to obtain its money, apparently conceded at least that the Commissioner's position had some substantial merit, for it reduced its claim accordingly. Under these circumstances I think that the Government's contention is correct that the judgment lacked that absolute quality which would justify its accrual in any year prior to the final settlement of all controverted questions relating to the claim and that was the year in which payment was made.

Third. I think that the plaintiff is entitled to recoup against the deficiency assessment involved in this suit, the amount of excise tax illegally collected from it between 1919 and 1922.

Equitable recoupment is a rule of the law which diminishes the right of a party invoking legal process to recover a debt, to the extent that he holds money or property of his debtor, to which he has no moral right. Ordinarily a defensive remedy going only to mitigation of damages, it will be applied in favor of a taxpayer who has brought suit to recover an alleged overpayment of tax exacted by summary procedure or the threat of it. Bull v. U. S., 295 U. S. 247.

In this case the government has money which it collected illegally from this taxpayer, against its protest, and which it has no right to retain. Only the statute of limitations stands in the way of the taxpayer's right to recover and the statute of limitations is not exactly a moral value. The rights and wrongs of the situation might be more complicated if the taxpayer's main contention was to be sustained, because then it would be retaining a tax benefit which only an erroneous guess as to the law by the Commissioner put into its pocket and of which only the statute of limitations prevented the collection; but as it is, apart from technical considerations, the equities are so plain as to admit of

no disagreement among just and reasonable men. Every consideration of fair dealing demands that the taxpayer be credited as against its present liability with the taxes which it has been illegally compelled to pay, and I think that the decisions of the courts fully justify such a solution.

The defendant contends that the plaintiff can have no right to recoupment in this case for two reasons. The first is that recoupment lies only in respect of a claim arising from the same transaction as that which is the basis of the adverse claim. That the two transactions must bear some reasonably definite relation to each other is recognized in all the decisions. Here the question is whether the illegal assessments of excise taxes for the years 1919 to 1922 bear a sufficiently close relation to the subject matter of this suit, namely, the refund of illegal assessments and collections of taxes imposed under the same statute upon articles of the
112 same description in subsequent years, to allow the application of the doctrine. The case of Dixie Margarine Co. v. Commissioner, 115 F. 2d 445, is on all fours with the present case and rules that it does. The court, in that case, said "the claim for refund and the deficiency assessment had a common origin, namely, the erroneous application of the Oleomargarine Act to petitioner's product, and petitioner's claim is therefore available in recoupment." Here the erroneous application of the Revenue Act to the plaintiff's product (storage batteries) gave rise to overpayments of 1919 to 1922, the refunds for 1922 to 1926 and the deficiency assessment for 1935 when the illegal exactions were restored. Dixie Margarine Co. v. Commissioner, supra, is a ruling by the Circuit Court of Appeals for the Sixth Circuit and, while not absolutely binding upon this court, ought to be followed unless it appears to be clearly erroneous. Far from that, it appears to be directly in line with the trend shown by the decisions of the Supreme Court in Lewis v. Reynolds, 284 U. S. 281; Bull v. U. S., supra, and Stone v. White, 301 U. S. 532, each of which marked a broadening of the scope of the doctrine and a step away from technical limitations upon it.

The other ground upon which the defendant denies the applicability of the doctrine of recoupment is the holding of McEachern v. Rose, 302 U. S. 56, to the effect that the limitation sections of the Revenue Act of 1928 preclude it. In that case the applicable sections were 607 and 609 (a), in the present case, 609 (b), but the distinction is immaterial.

Since the plaintiff can exercise the right of recoupment if no statutory provisions preventing it are applicable (American
113 Light & Traction Co. v. Harrison, 142 F. 2d 639), and since McEachern v. Rose, supra, holds that the limitation pro-

visions of the Revenue Act of 1928, so far as applicable, do impose a bar, the only question is whether those provisions are retroactive, because, in the present case, the overpayments were made long before the Act of 1928. The precise point was decided by the District Court in West Virginia Pulp and Paper Co. v. McElligott, 40 F. Supp. 765, 771. The court said, "A consideration of this policy seems to indicate that Sections 607 and 609 (b) should not be construed to have the retroactive effect of taking away the equitable defense of recoupment as applied to claims for refund of taxes assessed and paid before the enactment of those sections, which defense would otherwise be available." The defendant says simply that the West Virginia Pulp and Paper case is wrongly decided, and that both its rule and the plaintiff's position in the present case are clearly erroneous in that both are based on the proposition that recoupment is a substantive right whereas the defendant apparently considers it merely a procedural device. However, I think that it is a substantive right and I believe I may invoke the authority of Mr. Justice Roberts who said in Bull v. U. S., supra, "This procedural requirement does not obliterate his substantial right to rely on his cross-demand for credit of the amount which if the United States had sued him for income tax he could have recouped against his liability on that score." At any rate I agree that the Revenue Act of 1928 should not be construed retroactively and does not take away the right of recoupment which the plaintiff in this case otherwise has. In his dissenting opinion in American Light & Traction Co. v.
114 Harrison, 142 F. 2d 639, 645, Judge Evans came to the conclusion that the Section 820 (f) of the Revenue Act of 1938, "No adjustment shall be made under this section in respect of any taxable year beginning prior to January 1, 1932," had not enlarged or lessened any right which accrued before January 1, 1932 and it will be noted as to this point he was not dissenting to anything said in the majority opinion. As to this, I am also in accord.

The plaintiff concedes that, if it is accorded recoupment, the government is entitled to a corresponding right to recoup the amount of income taxes and interest saved by the plaintiff during the years 1922–1926 together with the benefit received by the plaintiff in the saving of income taxes and interest during the 1919–1922 period. However, after allowing this and striking a balance, the government will still have in its hands more than the amount of taxes and interest which the plaintiff is endeavoring to recover in this suit.

Judgment may be entered for the plaintiff in the amount claimed.

Findings and conclusions

I adopt, as special findings of fact, the facts in the stipulation or "Agreed Statement of Facts" filed by the parties.

I affirm all of the plaintiff's requests for findings of fact, all of which, except Nos. 4, 20, 21, 22 and 23, are based upon the stipulation.

I affirm all the defendant's requests for findings of fact except No. 9 which is denied as stated.

115 I affirm the plaintiff's requests for conclusions of law Nos. 5, 6, 7 and deny Nos. 1, 2, 3 and 4.

I affirm defendant's requests for conclusions of law No. 1 and deny Nos. 2 and 3.

Judgment accordingly.

116 In the District Court of the United States for the Eastern District of Pennsylvania

Civil Action No. 3299

THE ELECTRIC STORAGE BATTERY COMPANY, A CORPORATION

v.

WALTER J. ROTHENSIES, INDIVIDUALLY AND AS UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

Judgment

Filed Oct. 30, 1944

Before KIRKPATRICK, J.

And now, to wit: October 30th, 1944, in accordance with the Opinion of the Court filed this day, it is ORDERED that Judgment be and is hereby entered in favor of Plaintiff, The Electric Storage Battery Company and against Defendant, Walter J. Rothensies, Individually and as United States Collector of Internal Revenue for the First District of Pennsylvania, in the sum of Two Hundred Twenty-Nine Thousand Eight Hundred and Five and 34/100 ($229,805.34) Dollars, together with interest from December 5th, 1938, and costs.

By the Court.

Attest:

(S.) GILBERT W. LUDWIG,
Deputy Clerk.

117 In United States District Court

Certificate of probable cause

Filed Nov. 3, 1944

And now, to wit: this 1st day of November, A. D., 1944, the court, on motion of the United States Attorney for the Eastern District of Pennsylvania, representing the defendant in the above-entitled cause, hereby certifies that there was probable and reasonable cause for the act of said defendant, as Collector of Internal Revenue, in demanding and collecting from the above plaintiff, the internal-revenue tax, for the refund of which a judgment has been entered in favor of the said plaintiff.

S. KIRKPATRICK, J.

118 In United States District Court

Notice of appeal to the Circuit Court of Appeals for the Third Circuit (Under Rule 73 (b))

Filed Jan. 26, 1945

Notice is hereby given that Walter J. Rothensies, Individually and as United States Collector of Internal Revenue for the First District of Pennsylvania, defendant above named, hereby appeals to the Circuit Court of Appeals for the Third Circuit from the final judgment entered in this action on October 30, 1944.

S. GERALD A. GLEESON,
United States Attorney.
S. THOMAS J. CURTIN,
Assistant United States Attorney.

124 In United States Circuit Court of Appeals, for the Third Circuit

OCTOBER TERM, 1945

No. 8836

THE ELECTRIC STORAGE BATTERY CO., PLAINTIFF-APPELLEE

v.

WALTER J. ROTHENSIES, INDIVIDUALLY AND AS U. S. COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA, DEFENDANT-APPELLANT

Order assigning judge

Filed Oct. 4, 1945

And now, to wit: this 4th day of October A. D. 1945, it is ordered that Hon. Albert Lee Stephens, U. S. Circuit Judge, for the Ninth Circuit, District of ——, be, and he is hereby assigned to sit in above case in order to make a full court.

ALBERT B. MARIS,
Circuit Judge.

125 In the United States Circuit Court of Appeals for the Third Circuit

[Title omitted]

Minute entry

Oct. 4, 1945.

And afterwards, to wit, the 4th day of October, 1945, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert Lee Stephens, Honorable Albert B. Maris and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 27th day of November, 1945 come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

126 In the United States Circuit Court of Appeals for the Third Circuit

OCTOBER TERM, 1945

No. 8836

THE ELECTRIC STORAGE BATTERY COMPANY, A CORPORATION

v.

WALTER J. ROTHENSIES, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE, FIRST DISTRICT OF PENNSYLVANIA, APPELLANT

APPEAL FROM THE JUDGMENT OF THES DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued October 4, 1945

Before ALBERT LEE STEPHENS, MARIS and GOODRICH,

Circuit Judges

Opinion of the Court

Filed November 27, 1945

By GOODRICH, Circuit Judge.

This is a suit by a taxpayer to recover from the Collector
127 a sum which it alleges was wrongfully collected. The plaintiff was successful in the District Court and the Collector appeals.

The fact basis for the lawsuit is this: From 1919 to 1926 the taxpayer paid a large sum in excise taxes on the sale of its storage batteries; the government's exaction was based on the theory that the batteries were automobile accessories. Taxpayer disputed the legality of the tax and took appropriate action to preserve its rights to claim refund. In 1935 the government repaid to the taxpayer something more than a million dollars in settlement of a judgment which taxpayer had obtained to recover back the tax money paid by it. The period from 1919–1922 was not covered by the judgment, as claim for refund for the payments made during these years was barred by the statute of limitations. The money paid to the taxpayer in 1935 was treated as income for 1935 by the Commissioner, and this treatment resulted in the assessment of additional income and excess profits taxes for that year against the taxpayer. The taxpayer paid what was demanded with appropriate reservation of its rights and then sued to recover its money.

The plaintiff urged below and repeats here that payment of the judgment by the United States was not income to it in 1935. The District Court ruled against this contention and so do we. It is sufficient on this point to refer to our own decision and authorities cited in Freihofer Baking Co. v. Commissioner, — F. (2d) — (C. C. A. 3, 1945); 45-2 USTC par. 9400.

The interesting question is the one made the basis of the decision in the taxpayer's favor by the District Court. It involves taxpayer's right to meet its extra imposed tax liability of 1935 by recouping the payments it made from 1919–1922 upon this incorrectly imposed excise tax on the sale of its batteries. Refund for these payments, it will be remembered, is barred by lapse of time. The taxpayer admits this, but says that when being pressed to pay income tax on refund for some of those payments, it can recoup for the taxes it was illegally compelled to pay, even though it coud not sue for them.

128 For the purpose of deciding the rights and liabilities of the parties to this controversy, we may treat the case as though the taxpayer was being sued by the government and had set up its claim for recoupment to cut down the amount of recovery against it. The taxpayer does not lose his rights by the fact that he pays first and disputes the correctness of the payment later, if he takes the proper steps to preserve his claim. The difference between a claim by the government for taxes and the ordinary claim by one private litigant against another was discussed by the Supreme Court in Bull v. United States, 295 U. S. 247 (1935). That decision is authority for our approach to the question here.

Bull v. United States is also authority for the proposition that the defense of recoupment is not barred by the statute of limitations "so long as the main action is timely" (p. 262). That is, if the United States had sued this taxpayer for an alleged unpaid tax for 1935, the taxpayer would not be barred from setting up in recoupment a claim otherwise proper as recoupment, because suit on that claim by the taxpayer would be barred by the statute of limitations.

Is the taxpayer's claim in this case a proper subject for recoupment as against the government's claim for unpaid income tax for 1935? The Court in Bull v. United States says recoupment is in the nature of a defense "arising out of some feature of the transaction upon which the plaintiff's action is grounded". The turning point of this case is whether the taxpayer's claim meets this test. "Transaction" is manifestly the key word. Is taxpayer's claim for recoupment part of the "transaction" on which the government's claim for additional income tax for 1935 is grounded?

The argument for the taxpayer can be simply put. The additional tax asked for by the government was not from taxpayer's

income from its general business, but from the payment to
129 the taxpayer of the incorrectly collected excise tax on the sale of its batteries. The recoupment asked for was a stale claim for three additional years of payments on the same tax. Both government demand and taxpayer's claim had their origin in the same source in one sense. They grew out of seven years of improperly assessed excise taxes on the sale of batteries. In another sense, obviously, the sale of each battery over the seven years was a separate matter, carrying its own burden of tax and not the same transaction as that of the sale of another battery several years away, or, for that matter, another battery to a different buyer the same day. We doubt whether even the government argument would insist that individual battery sales constituted each its own "transaction". How many sales together make up a "transaction"? We see no reason for lumping them by calendar years. The nature of the merchandise sold was the same; the imposition of the tax was the same. What the taxpayer wants us to do, and what it persuaded the District Court to do, is to regard the sales over several years of this merchandise and the tax thereon as a "transaction" sufficient for application of the recoupment doctrine.

Recoupment, unlike set-off and counterclaim, is a product of judicial, not legislative action.[4] There is little or no help to be had from dictionary or judicial definition or description of the word "transaction" when applied in other situations, to its meaning as used here. If one turns to a discussion of its meaning in statutory counterclaim, he finds a recognized authority stating as follows:

"The only test, which can be consonant with the function of the counterclaim is whether the particular counterclaim could, in the court's discretion, be expediently tried with the plaintiff's case."[5]

130 This consideration of expediency is said to be back of the "transaction" element in recoupment[6] and is repeated in Waterman's textbook on the subject,[7] and ought to be applied where possible to produce results which accord with one's sense of fairness. It is not to be construed like a penal law and to have each word used in describing its application held to a precise and technical meaning. We need not take it as the sole criterion, and for the purpose of deciding this case, do not need to settle with exactness what the limits are. The doctrine of recoupment is

[4] Short summaries describing it may be found in Restatement, Judgments, p. 217, and in a paper "The Pleading of Counterclaims," by Charles E. Clark and Leighton H. Surbeck (1927–1928), 37 Yale L. Jour. 309.

[5] Clark article, supra, p. 316.

[6] "The Doctrine of Recoupment in Federal Taxation," by David H. McConnell (1942), 28 Va. L. Rev. 577.

[7] Waterman on Set-off, Recoupment, and Counterclaim (1869), 552. "Although recoupment is only available where both demands spring from one transaction; yet [illegible]ing claims, in order to be adjusted in this way in one action, need not be of the same character."

based on concepts of fairness.[8] We see no reason, therefore, for hedging the "transaction" part of the requirement within close quarters, especially where, as here, there is a logical connection between main claim and recoupment claim. As to the fairness of the matter, we agree with the District Court where his opinion stated:

"Every consideration of fair dealing demands that the taxpayer be credited as against its present liability with the taxes which it has been illegally compelled to pay, and I think that the decisions of the courts fully justify such a solution."

All this leads to a conclusion that the taxpayer should prevail, unless some rule preventing recovery stands in the way. The same result is indicated by such judicial authority as there is upon the point. Bull v. United States, supra, is the foundation case.[9]

In that case, however, the main claim and recoupment claim
131 were more closely connected than they are here. The District Court believed Dixie Margarine Co. v. Commissioner, 115 F. (2d) 445 (C. C. A. 6, 1940) to be directly in point. We agree. Appellant admits the decision is in point, but says it is wrong. It also says that it is deprived of any persuasive authority because it was an appeal from the Board of Tax Appeals and in a later decision (Commissioner v. Gooch Co., 320 U. S. 418 (1943)) the Supreme Court has held that the Board of Tax Appeals has no jurisdiction of recoupment. That the Supreme Court has so held there is no doubt. Equally clear, we think, is that whatever value the Dixie Margarine decision has for us in its discussion of recoupment is not lessened by the fact that if the case came up again, it would go off on the jurisdictional question. There is no doubt that in the instant case, the District Court was a tribunal with general equity powers, and if recoupment is called for, it can be allowed. Whatever may be the status of the Dixie Margarine decision it is, of course, not binding upon us, and we must take the responsibility of deciding the present litigation in accordance with the law as we see it. There is no disposition to evade that responsibility.

STATUTORY PROVISIONS

The government further contends that recoupment is not available to the taxpayer here because of the statutory bar of §§ 608 (a) and 609 (b) of the Revenue Act of 1928. It cites the following language from § 608

[8] See the language of the Court in Crossett Lumber Co. v. United States, 87 F. (2d) 930, 932 (C. C. A. 8, 1937).

[9] McConnell, The Doctrine of Recoupment in Federal Taxation (1942), 28 Va. L. Rev. 577, 586: "The leading case on the application of recoupment in tax cases is Bull v. United States." At page 607, the article states as a conclusion, "Thus four principles seems apparent: (1) That the broad recoupment doctrine of Bull v. United States is still applicable in tax cases. * * *"

"A refund of any portion of an internal-revenue tax * * * shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, * * *"

and from § 609

"A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608."

132 Then it cites McEachern v. Rose, 302 U. S. 56 (1937).

The conclusion urged is that since the time for filing claims for refund of the 1919–1922 taxes had expired, a refund of them would be erroneous, and by the same token, a credit of the overpayment represented by those taxes given to taxpayer for 1935 taxes would be void under § 609 (b). The conclusion urged seems a long journey from the language of the statute cited. Does the statutory language mean that a taxpayer cannot have credit by recoupment in a case where he was too late to prosecute a claim for refund?

The first trouble we have with that conclusion is Bull v. United States, already quoted from. There, as here, the claim of the taxpayer arose before the 1928 statute the litigation in which it was set up as recoupment came later. The result in the Bull case seems contrary to the argument being discussed here, and that decision met no adverse criticism in McEachern v. Rose and was cited with apparent approval in Commissioner v. Gooch Co., 320 U. S. 418 (1943).

Argument for the taxpayer points out that the sections under consideration have nothing to do with courts; they are part of the Administrative Provisions in both the 1928 Act and in the later codification, and that they talk the language of direction to administrative officers in terms like making a refund or giving a credit. There is some persuasive force in this argument, but it is not consistent with the view of the Supreme Court in McEachern v. Rose, supra. There it is said: (pp. 59; 60) "We may assume that, in the circumstances, equitable principles would preclude recovery in the absence of any statutory provision requiring a different result. But Congress has set limits to the extent to which courts might otherwise go in curtailing a recovery of overpayments of taxes because of the taxpayer's failure to pay other taxes which might have been but were not assessed against him." The Court treats these sections as making a rule for courts as well as commissioners and collectors. It is to be noted, however, that

133 the language quoted has to do with government attempt to apply recoupment against a taxpayer. Later in the same paragraph the language of the opinion says: "These provi-

sions preclude the Government from taking any benefit from the taxpayer's overpayment by crediting it against an unpaid tax whose collection has been barred by limitation."

Taxpayer makes a strong point of the fact that the McEachern decision and others since[10] have used the limitation of the sections quoted against the government only.[11] Not only does taxpayer point to the result of the decisions, but offers a reason for the application to government and not to taxpayer which appeals to us as having force. It has to do with the public policy involved in protecting taxpayers who pay taxes first and litigate their correctness later. If a taxpayer is advised that a tax is improperly assessed he should not be in a worse position if he pays and seeks refund than if he forced tax authorities to proceed against him. In the latter case, in the defense he makes, he will not have any question of an earlier tax, recovery of which is barred by the statute. Neither should he, if he pays the improperly imposed tax and seeks his money back.[12]

No such considerations apply to a defending taxpayer if his case comes within the equitable principles of recoupment. Such limitations, then, as the quoted sections impose are applicable to government and not to taxpayer. The public policy in inducing prompt payment of taxes is stronger than preservation to the government of its equitable rights of recoupment. We think this theory is sound and we accept it.

134 There is a further reason for rejecting the application of §§ 608 and 609 to this case and which was adopted by the court below upon the authority of West Va. Pulp and Paper Co. v. McElligott, 40 F. Supp. 765 (D. C. S. D. N. Y. 1941). It is to the effect that the right to recoupment is a substantive right, and that the right vested when the taxes were improperly exacted, back in 1919–1922. The statute in question came years later. It should not be interpreted retroactively to cut off vested rights. Government's attempt to distinguish the cited case appears to us unconvincing. We think the limitation of the statute to cases where the taxpayer's right arose after its passage is probably right, though the application to government and not to taxpayer seems to us a more compelling reason for the taxpayer's position in this case. At any rate, we have no doubt of the correctness of the District Court's conclusion on this point.

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[10] American Light & Traction Co. v. Harrison, 142 F. (2d) 639 (C. C. A. 7, 1944); Loeb v. Hoey, 112 F. (2d) 4 (C. C. A. 2, 1940); Penn et al v. Robertson, 29 F. Supp. 386 (D. C. M. D. N. C. 1939); Crawford et al v. Hiner, 23 F. Supp. 240 (D. C. W. D. Pa. 1938).

[11] The paper quoted above, "Recoupment in Federal Taxation," treats the problem of these sections as wholly a question of what obstacle they present to application of the doctrine of recoupment by the government. See p. 582 of 28 Va. L. Rev.

[12] See, along this line, "Estoppel and Recoupment in Federal Taxation * * *" 1939), 52 Harv. L. Rev. 496.

IS THIS SUIT AGAINST THE WRONG COLLECTOR?

Finally, the government says that the taxpayer may not recover by recoupment, tax money which he alleges was illegally collected by another collector than the party to this action. There is no dispute about the general proposition of law behind this argument, especially in view of its latest discussion in United States v. Kales, 314 U. S. 186 (1941). We do not think it applies to this litigation.

Literally this lawsuit was brought against Walter J. Rothensies, the collector to whom the plaintiff paid its money for 1935 tax. But as pointed out earlier in this opinion, our analysis of the legal problem is made clearer if we think of this suit as one brought by the United States to recover the alleged deficiency in the 1935 income tax of the taxpayer. In that suit the defendant seeks to recoup the tax payments it made, but which it could not collect because of the lapse of time. Is this recoupment claim an action against a collector, so that a taxpayer's recoupment will depend upon the continuity in office of the same individual as collector? That could be the law, but one does not reach such an unnatural conclusion unless forced to do so.

135

We think the answer is this: a collector is collecting the government's claim, not his own. Its source is the taxing statute and when the money is collected it goes to the public treasury. If he has improperly collected money, the taxpayer has the common law right to sue him as an individual to get it back. But that does not make the tax receipts collector's individual property, nor his claim against a taxpayer a personal claim of his own. We see no difficulty in a taxpayer's setting up, if proceedings were brought by public authorities, a recoupment claim for taxes paid a predecessor of the present collector. This conclusion is supported by a technical make-weight, justified because of the highly technical nature of the government's argument on this point. Recoupment, unlike statutory set-off and counterclaim, allows for no affirmative judgment for one who successfully asserts it. It is a shield not a sword. The most it can do is to protect one against a recovery by an opponent. A recoupment claim in a tax case is not a suit against a collector at all, but only a defense against what the collector asserts. If this is technical, it is no more so than the argument which it answers.

In a supplemental memorandum the government raises a point first made in oral argument before this Court. It points out that the additional income and excess profits tax for 1935 was not paid until 1938. At that time the taxpayer paid the principal sum with the interest which had then accrued. This is what it now seeks to get back. The government's argument is that apart from statute

or contract, interest cannot be recovered against the government on the part of a successful claimant. We have no reason now to go into the limits, if any, of the proposition urged. It is quite clear that it has nothing to do with the case. The taxpayer is not seeking interest on an amount which it paid the government, but is seeking to get back cash which it paid. That part of this
136 cash was principal sum and part of it was interest does not change the matter. It is not seeking interest on the cash that it paid, but just to get that cash back.

The point arose because the taxpayer's recoupment claim, while more than sufficient to take care of the principal amount assessed as additional tax in 1935, is not quite large enough to cover both that amount and the interest accrued on it. But the recoupment claim need only counterbalance the principal amount of tax. For if it does then no tax was owing and consequently no interest could rightfully accrue to the government on it. The government cannot keep the interest on late payment of a tax which the taxpayer did not have to pay. The orginal recoupment claim is relevant only in determining whether the tax had to be paid. Since it did not, both it and the interest paid on it may be recovered.

The conclusion is that the District Court was right and the judgment is affirmed.

137. In the United States Circuit Court of Appeals for the Third Circuit

October Term, 1945

No. 8836

The Electric Storage Battery Company

v.

Walter J. Rothensies, Individually and as Collector of Internal Revenue, appellant

Judgment

Filed Nov. 27, 1945

Present: Albert Lee Stephens, Maris and Goodrich, Circuit Judges.

On appeal from the District Court of the United States, for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

By the Court.

GOODRICH,
Circuit Judge.

NOVEMBER 27, 1945.

(File endorsement omitted.)

138 [Clerk's Certificate to foregoing transcript omitted in printing.]

139 Supreme Court of the United States

Order allowing certiorari

Filed March 25, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

140 In the Supreme Court of the United States

Stipulation as to printed record

Filed April 2, 1946

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the parties above-named that, for purposes of the writ of certiorari, the printed record shall consist of the following:

(1) Docket entries.
(2) Complaint and Exhibits A, B and C attached thereto.
(3) Answer.
(4) Stipulation of counsel as to Amendment to Answer.
(5) Amendment to Answer.
(6) Agreed statement of facts.
(7) Plaintiff's Requests for Findings of Fact and Conclusions of Law.

(8) Defendant's Requests for Findings of Fact and Conclusions of Law.
(9) Opinion, Findings and Conclusions of District Court.
(10) Judgment of District Court.
(11) Certificate of Probable Cause.
(12) Notice of Appeal.
141 (13) Proceedings in Circuit Court of Appeals.
(14) This stipulation.

J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General of the United States,
For the Petitioner.

Norris, Lex, Hart & Eldredge,
NORRIS, LEX, HART & ELDREDGE,
By: LAWRENCE W. ELDREDGE,
For the Respondent.

Dated this 27th day of March, 1946.

(Endorsement on cover:) File No. 50595. U. S. Circuit Court of Appeals, Third Circuit. Term No. 892. Walter J. Rothensies, Individually and as United States Collector of Internal Revenue for the First District of Pennsylvania, Petitioner vs. The Electric Storage Battery Company, a Corporation. Petition for writ of certiorari and exhibit thereto. Filed February 26, 1946. Term No. 892 O. T. 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1946